DOCKET

No. 13-1074

Title:	United States, Petitioner
	v.
	Kwai Fun Wong
Docketed:	March 7, 2014
Linked with 13A653	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(10-36136)
Decision Date:	October 9, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 23 2013	Application (13A653) to extend the time to file a petition for a writ of certiorari from January 7, 2014 to February 6, 2014, submitted to Justice Kennedy.
Dec 27 2013	Application (13A653) granted by Justice Kennedy extending the time to file until February 6, 2014.
Jan 23 2014	Application (13A653) to extend further the time to file a petition for a writ of certiorari from February 6, 2014 to March 8, 2014, submitted to Justice Kennedy.
Jan 24 2014	Application (13A653) granted by Justice Kennedy extending the time to file until March 8, 2014.
Mar 7 2014	Petition for a writ of certiorari filed. (Response due April?, 2014)
Apr 1 2014	Order extending time to file response to petition to and including May 7, 2014.
May 7 2014	Brief of respondent Kwai Fun Wong in opposition filed.
May 27 2014	DISTRIBUTED for Conference of June 12, 2014.
May 29 2014	Reply of petitioner United States filed. (Distributed) VIDED.
Jun 16 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	Petition GRANTED.
Jul 23 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 9, 2014.
Jul 23 2014	The time to file respondent's brief on the merits is extended to and including November 4, 2014.
Sep 4 2014	SET FOR ARGUMENT on Wednesday, December 10, 2014.
Sep 9 2014	Joint appendix filed. (Statement of costs filed.)
Sep 9 2014	Brief of petitioner United States filed.
Sep 22 2014	Record requested from U.S.C.A. 9th Circuit.
Sep 24 2014	Record received from U.S.C.A. 9th Circuit is electronic and located on PACER.

Nov 4 2014	Brief of respondent Kwai Fun Wong filed. (Distributed)
Nov 7 2014	CIRCULATED.
Nov 10 2014	Brief amicus curiae of Gregory C. Sisk filed. VIDED. (Distributed)
Nov 12 2014	Brief amicus curiae of American Association for Justice filed. VIDED. (Distributed)
Nov 12 2014	Brief amicus curiae of Clinic for Legal Assistance to Servicemembers and Veterans filed. (Distributed)
Nov 12 2014	Brief amici curiae of Paralyzed Veterans of America, et al. filed. (Distributed).
Dec 3 2014	Reply of petitioner United States filed. (Distributed)
Dec 10 2014	Argued. For petitioner: Roman Martinez, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Eric Schnapper, Seattle, Wash.
Apr 22 2015	Judgment is AFFIRMED and CASE REMANDED. Kagan, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Scalia and Thomas, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

13-1074

No.

SUPREME COURT, U.S.
FILED
MAR - 7 2014
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
MARK B. STERN
ANNE MURPHY
ADAM C. JED
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the six-month time bar for filing suit in federal court under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant in the district court and the appellee in the court of appeals, is the United States of America. The following individuals were also defendants in the district court: David V. Beebe, Jerry F. Garcia, Jack O'Brien, and Douglas Glover. Those defendants are no longer parties in the case and are not petitioners here.

Respondent, who was the plaintiff in the district court and the appellant in the court of appeals, is Kwai Fun Wong. The Wu Wei Tien Tao Association and Chong Hua Shen Mu Gong were also plaintiffs in the district court but are no longer parties in the case.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 10
A. The FTCA's six-month suit-filing deadline is not subject to equitable tolling 11
B. The en banc Ninth Circuit decision further perpetuates widespread confusion and conflict among the courts of appeals 22
Conclusion 25
Appendix A — Court of appeals opinion (Oct. 9, 2013) 1a
Appendix B — District court opinion and order (Oct. 28, 2010) 103a
Appendix C — District court order (Apr. 10, 2006) 106a
Appendix D — Magistrate judge findings and recommendation (Feb. 14, 2006) 108a
Appendix E — District court order (June 25, 2002) 128a
Appendix F — Magistrate judge findings and recommendations (Apr. 5, 2002) 130a
Appendix G — Court of appeals memorandum (June 4, 2010) 187a
Appendix H — Court of appeals opinion (June 25, 2004) 190a
Appendix I — District court order (Apr. 11, 2007) 239a
Appendix J — Magistrate judge findings and recommendation (Jan. 24, 2007) 242a
Appendix K — Court of appeals order (Jan. 3, 2013) 307a
Appendix L — Statutory provisions 308a

TABLE OF AUTHORITIES

Cases: Page

Adkins v. *United States*, 896 F.2d 1324 (11th Cir. 1990) 18
"Agent Orange" Prod. Liab. Litig., In re, 818 F.2d 210 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) 18
Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) 2
Allgeier v. *United States*, 909 F.2d 869 (6th Cir. 1990) 18
Anderberg v. *United States*, 718 F.2d 976 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984) 18
Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2011) 16
Arteaga v. *United States*, 711 F.3d 828 (7th Cir. 2013) 23
Bazzo v. *United States*, 494 Fed. Appx. 545 (6th Cir. 2012) 24
Benge v. *United States*, 17 F.3d 1286 (10th Cir. 1994) 24
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 4
Bowles v. *Russell*, 551 U.S. 205 (2007) 7
Brady v. *United States*, 211 F.3d 499 (9th Cir.), cert. denied, 531 U.S. 1037 (2000) 7
Charlton v. *United States*, 743 F.2d 557 (7th Cir. 1984) 18
Dalehite v. *United States*, 346 U.S. 15 (1953) 12
de Arnaud v. *United States*, 151 U.S. 483 (1894) 13
FEMA Trailer Formaldehyde Prods. Liab. Litig., In re, 646 F.3d 185 (5th Cir. 2011) 24
Finn v. *United States*, 123 U.S. 227 (1887) 13

Cases—Continued: Page

Fourco Glass Co. v. *Transmirra Prods. Corp.*, 353 U.S. 222 (1957) 15
Glarner v. *United States*, 30 F.3d 697 (6th Cir. 1994) 24
Gonzalez-Bernal v. *United States*, 907 F.2d 246 (1st Cir. 1990) 18
Gould v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) 18
Harvey v. *United States*, 685 F.3d 939 (10th Cir. 2012) 24
Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 16, 17
Holland v. *Florida*, 560 U.S. 631 (2010) 19, 21
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 18
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) ..... *passim*
June v. *United States*, No. 11-17776, 2013 WL 6773664 (9th Cir. Dec. 24, 2013) 11, 23
Kendall v. *United States*, 107 U.S. 123 (1883) 13
Kokotis v. *USPS*, 223 F.3d 275 (4th Cir. 2000) 24
Kosak v. *United States*, 465 U.S. 848 (1984) 20
Lozano v. *Alvarez*, No. 12-820 (Mar. 5, 2014) 19
Mader v. *United States*, 654 F.3d 794 (8th Cir. 2011) 16
Mann v. *United States*, 399 F.2d 672 (9th Cir. 1968) 18
Marley v. *United States*, 567 F.3d 1030 (9th Cir.), cert. denied, 558 U.S. 1076 (2009) 6
McNeil v. *United States*, 508 U.S. 106 (1993) 3, 15, 17, 22
Motta v. *United States*, 717 F.3d 840 (11th Cir. 2013) 24
Norman v. *United States*, 467 F.3d 773 (D.C. Cir. 2006) 24
Perez v. *United States*, 167 F.3d 913 (5th Cir. 1999) 24

Cases—Continued: Page

Peterson v. *United States*, 694 F.2d 943 (3d Cir. 1988) 18
Phillips v. *Generations Family Health Ctr.*, 723 F.3d 144 (2d Cir. 2013) 24
Reed Elsevier, Inc. v. *Muchnick*, 559 U.S. 154 (2010) 16
Russello v. *United States*, 464 U.S. 16 (1983) 21
Sanchez v. *United States*, 740 F.3d 47 (1st Cir. 2014) 23
Santos v. *United States*, 559 F.3d 189 (3d Cir. 2009) 23
Schmidt v. *United States*, 901 F.2d 680 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991) 18
Sebelius v. *Auburn Regional Med. Ctr.*, 133 S. Ct. 817 (2013) 16, 18
Sexton v. *United States*, 832 F.2d 629 (D.C. Cir. 1987) 18
Simon v. *United States*, 244 F.2d 703 (5th Cir. 1957) 18
Soriano v. *United States*, 352 U.S. 270 (1957) 16
T.L. v. *United States*, 443 F.3d 956 (8th Cir. 2006) 23
United States v. *Beggerly*, 524 U.S. 38 (1998) 21
United States v. *Brockamp*, 519 U.S. 347 (1997) 10, 18, 19, 21, 22
United States v. *Kubrick*, 444 U.S. 111 (1979) 2, 17
United States v. *Muniz*, 374 U.S. 150 (1963) 20
United States v. *Wardwell*, 172 U.S. 48 (1898) 13
Young v. *United States*, 535 U.S. 43 (2002) 21
Young v. *United States*, 727 F.3d 444 (5th Cir. 2013) 24

Statutes: Page

Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) 13
Act of June 25, 1948, ch. 646:
sec. 1, 62 Stat. 869:
Ch. 85, §§ 1331 *et seq.*, 62 Stat. 930 14
§ 1346, 62 Stat. 933 14
§ 1346(b), 62 Stat. 933 14
Ch. 161, §§ 2401 *et seq.*, 62 Stat. 970 14
§ 2401(b), 62 Stat. 971 14
Ch. 171, §§ 2671 *et seq.*, 62 Stat. 982 14
§§ 2671-2680, 62 Stat. 982-985 14
§ 33, 62 Stat. 991 15
Act of Apr. 25, 1949, ch. 92, 63 Stat. 62:
§ 1, 63 Stat. 62 ..... 15, 20
§ 2(a), 63 Stat. 62 14
Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306:
§ 2(a), 80 Stat. 306 15
§ 7, 80 Stat. 307 15
Federal Tort Claims Act, ch. 753, Tit. IV:
§ 410(a), 60 Stat. 843-844 13
§ 420, 60 Stat. 845 ..... 12, 13, 14
Judicial Code, ch. 231, § 156, 36 Stat. 1139 13
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1 4
Tucker Act, ch. 359, 24 Stat. 505 12
28 U.S.C. 1346(b) 2
28 U.S.C. 1346(b)(1) 2, 7, 16, 308a
28 U.S.C. 1491 *et seq.* (Ch. 91) 15
28 U.S.C. 1491 15
28 U.S.C. 2401(a) 20

Statutes—Continued: Page

28 U.S.C. 2401(b) ..... *passim*
28 U.S.C. 2501 *et seq.* (Ch. 165) 15
28 U.S.C. 2501 15
28 U.S.C. 2671-2680 (Ch. 171) 2, 16
28 U.S.C. 2675(a) 3, 7, 16
28 U.S.C. 2679(d)(5) 20

Miscellaneous:

H.R. 6716, 69th Cong., 1st Sess. (1926) 20
H.R. 9285, 70th Cong., 1st Sess. (1928) 19
H.R. 15428, 71st Cong., 3d Sess. (1930) 19
H.R. 16429, 71st Cong., 3d Sess. (1931) 19
S. 1912, 69th Cong., 1st Sess. (1926) 20
S. 4377, 71st Cong., 2d Sess. (1930) 19
S. 4567, 72d Cong., 1st Sess. (1932) 19
S. 1833, 73d Cong., 1st Sess. (1933) 19
S. 1043, 74th Cong., 1st Sess. (1935) 19
S. Rep. No. 1327, 89th Cong., 2d Sess. (1966) 3
Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong. (1940) 20
Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 20

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-102a) is reported at 732 F.3d 1030. The order of the district court granting reconsideration (App., *infra*, 103a-105a) is unreported. An order of the district court (App., *infra*, 106a-107a), adopting the magistrate judge's findings and recommendation on summary judgment (App., *infra*, 108a-127a), is unreported but is available at 2006 WL 977746. A prior order of the district court (App., *infra*, 128a-129a), adopting the magistrate judge's findings and recommendation (App., *infra*, 130a-186a), is unreported, but the findings and recommendations are availa-

ble at 2002 WL 31548486. A prior memorandum opinion of the court of appeals (App., *infra*, 187a-189a) is not published in the *Federal Reporter* but is reprinted at 381 Fed. Appx. 715. Another prior opinion of the court of appeals (App., *infra*, 190a-238a) is reported at 373 F.3d 952. Another order of the district court (App., *infra*, 239a-241a), adopting the magistrate judge's findings and recommendations on summary judgment (App., *infra*, 242a-306a), is unreported but is available at 2007 WL 1170621.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2013. On December 27, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 6, 2014. On January 24, 2014, Justice Kennedy further extended the time to March 8, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 308a-312a.

STATEMENT

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671-2680. The FTCA "waive[s] the United States' sovereign immunity for claims" against the United States for money damages "arising out of torts committed by federal employees." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). The Act grants federal district courts "exclusive jurisdiction" over such actions, 28 U.S.C. 1346(b)(1), subject to certain

conditions. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979).

A tort action against the United States "shall not be instituted * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). If the claim is not "presented in writing to the appropriate Federal agency within two years after such claim accrues," it "shall be forever barred." 28 U.S.C. 2401(b). The requirement that the claim first be presented to the appropriate agency allows the agency with the "best information" to "consider[]" and resolve the claim "without the need for filing suit and possibl[y] expensive and time-consuming litigation." *McNeil* v. *United States*, 508 U.S. 106, 112 n.7 (1993) (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 3 (1966)).

A plaintiff may not file suit in federal court until the claim is "finally denied by the agency in writing and sent by certified or registered mail," or until six months have passed without the agency making "final disposition" of the claim. 28 U.S.C. 2675(a). A premature complaint, filed before that six-month period for consideration by the agency has expired, must be dismissed. *McNeil*, 508 U.S. at 110-113. By the same token, and of particular relevance here, if an "action" in court is not "begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented," the claim "shall be forever barred." 28 U.S.C. 2401(b).

2. Respondent, Wong, a citizen of Hong Kong, was held in immigration detention in the Multnomah

County Detention Center in Portland, Oregon for five days while awaiting expedited removal. App., *infra*, 109a-110a. On June 22, 1999, she was removed from the United States. *Id.* at 110a.

a. On May 18, 2001, respondent filed two documents relevant to this case. App., *infra*, 5a. The first was an action in federal court seeking damages based on respondent's removal and the conditions of her confinement prior to removal. *Id.* at 5a, 110a-111a, 131a. The complaint asserted various constitutional claims against officials in Portland in the Immigration and Naturalization Service (INS) in their individual capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App., *infra*, 131a. The second relevant filing was a claim presented to the INS under the FTCA, alleging (among other things) negligence based on the conditions of respondent's confinement. *Id.* at 5a, 110a-111a.

The federal court case proceeded. In October 2001, respondent filed a first amended complaint adding the United States as a defendant and asserting additional claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1.[1] App., *infra*, 112a n.4. On November 9 and 14, 2001, respondent sought leave to file a second amended complaint that would add an FTCA claim against the United States. *Id.* at 5a-6a,

---

[1] The individual defendants were ultimately dismissed from the case, as were the RFRA claims. App., *infra*, 187a-306a. Several FTCA claims were later dismissed by the district court. *Id.* at 239a-306a. Because the United States is the only defendant still in the case, and a negligence claim under the FTCA is the only remaining claim, *id.* at 5a, this brief will use the term FTCA "claim" throughout.

111a-112a. At the time of respondent's motion, the INS had not finally denied her claim and six months had not yet elapsed from the date on which she presented her claim to the INS. Respondent therefore asked the court to grant her motion "on or after November 20, 2001," at which time she would treat the agency's failure to act as a denial. *Id.* at 5a-6a, 111a. The United States opposed the motion to amend and argued that respondent should have to file a new civil action after completely exhausting her administrative remedies. *Id.* at 182a-184a.

On December 3, 2001, the INS issued a final denial of respondent's administrative claim. App., *infra*, 6a. Respondent thus had six months (until June 3, 2002) to bring an action in federal court under the FTCA. *Ibid.*; see 28 U.S.C. 2401(b). Respondent did not file a new civil action and did not ask the district court to expedite the pending motion to amend. On April 5, 2002, the magistrate judge recommended that respondent be granted leave to file a second amended complaint. App., *infra*, 130a, 182a-185a. On June 25, 2002, three weeks after the six-month deadline had passed, the district court adopted the magistrate judge's findings and recommendation. *Id.* at 128a-129a. Seven weeks later, on August 13, 2002, respondent filed a second amended complaint adding (among other things) a negligence claim against the United States under the FTCA. *Id.* at 7a.

b. The United States moved for summary judgment arguing, *inter alia*, that the district court lacked jurisdiction over respondent's FTCA claim because it was not timely filed. App., *infra*, 108a-109a, 112a-117a. The magistrate judge disagreed, *id.* at 112a-117a, and the district court adopted her findings and

recommendation, *id.* at 106a-107a. The court did not dispute that the FTCA claim was not filed within the time limits required by statute: if deemed filed when respondent first moved to amend the complaint, it was filed too early (because the administrative claim had not yet been denied or deemed denied), and if deemed filed when respondent actually filed the second amended complaint, then it was too late (because more than six months had elapsed after final denial of the administrative claim). The court nevertheless agreed to equitably toll the six-month time period for 81 days (between the date the magistrate judge recommended that respondent be granted leave to amend and the date the district court actually granted such leave), and declined to dismiss the FTCA claim on timeliness grounds. *Id.* at 117a.

c. Several years later, while the case was still pending in district court, the Ninth Circuit decided *Marley* v. *United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). In *Marley*, the Ninth Circuit held that the six-month time limit for filing suit under the FTCA cannot be equitably tolled because the statutory deadlines for FTCA claims against the United States are jurisdictional. *Id.* at 1033-1038.

d. Relying on *Marley*, the United States moved for reconsideration. App., *infra*, 103a-105a. The district court granted the motion, held that it lacked jurisdiction over respondent's untimely FTCA claim, and entered final judgment in favor of the United States. *Ibid.*

3. Respondent appealed. After oral argument, the court of appeals sua sponte ordered the case to be heard en banc to resolve an intracircuit conflict. App.,

infra, 307a. A divided en banc panel reversed in four separate opinions. *Id.* at 1a-102a.

a. Judge Berzon, writing for an eight-judge majority, first held that the FTCA's six-month time bar is not jurisdictional. App., *infra*, 1a-36a. The court found that "nothing in the language of [Section] 2401(b)—including the term 'shall . . . be barred,' and the word 'forever'—supplies a 'clear statement' that Congress intended the six-month filing deadline to be jurisdictional." *Id.* at 22a-23a. The court noted that the limitations period is located in a different section and chapter than the FTCA's "jurisdiction-granting provision" in 28 U.S.C. 1346(b)(1), and it declined to give any weight to the statutory history demonstrating that this placement was a result of the 1948 recodification and reorganization of Title 28, in which no substantive changes were intended. App., *infra*, 23a-29a. The court also relied on the absence of "a century's worth of precedent" from this Court ranking the "time limit as jurisdictional," as had been the case with the time for taking an appeal at issue in *Bowles* v. *Russell*, 551 U.S. 205, 209 n.2 (2007). App., *infra*, 30a-32a (citation omitted). And the court distinguished the FTCA's requirement in 28 U.S.C. 2675(a) of prior presentation of the claim to the appropriate agency, which had previously found to be "jurisdictional." App., *infra*, 34a-35a (quoting *Brady* v. *United States*, 211 F.3d 499, 502 (9th Cir.), cert. denied, 531 U.S. 1037 (2000)). In sum, the court found "nothing in the text, context, or purpose of [Section] 2401(b) clearly indicat[ing] that the FTCA's six-month limitations period implicates the district courts' adjudicatory authority." *Id.* at 35a-36a.

The court of appeals acknowledged that "even if [a time deadline] is not jurisdictional, tolling may still be precluded by a sufficiently clear congressional expression of that restriction." App., *infra*, 15a. But in addressing that issue, the court applied a "particularly strong" "presumption in favor of equitable tolling." *Id.* at 36a-38a. The court found such a "strong" presumption warranted because, in its view, Congress intended "suits against the government" under the FTCA to be "treated no differently than suits against private defendants," and because courts have applied a "discovery" rule to determine when a claim "accrues" for purposes of the two-year deadline for presenting a claim to the responsible agency. *Ibid.* (citation omitted). For reasons similar to those on which the court relied to find Section 2401(b) nonjurisdictional, the court concluded that its strong "presumption" in favor of equitable tolling had not been "overcome." *Id.* at 40a-43a.

Finally, the court of appeals held that respondent was entitled to equitable tolling in this case. App., *infra*, 43a-48a. The court proceeded on the assumption that respondent's FTCA claim was filed "too late," declining to find an earlier "constructive filing date" under which the claim would have been timely. *Id.* at 43a-45a. In the court's view, however, respondent's failure to file an FTCA complaint within the six-month period after her claim was denied by the INS "was not the consequence of any fault or lack of due diligence on [her] part," but the result of "the delay inherent in the Magistrate Judge system." *Id.* at 46a, 47a. The court rejected the government's contention that equitable tolling was inappropriate because respondent could have "request[ed] a timely ruling" or

could have filed a separate FTCA complaint anytime during the six-month period. *Id.* at 47a. The court accordingly applied "equitable tolling * * * to excuse [respondent's] late-filed amended complaint" and remanded for the FTCA claim to proceed. *Id.* at 48a.

b. Chief Judge Kozinski concurred in the judgment. App., *infra*, 48a-52a. He agreed with the dissenters that "[Section] 2401(b) is jurisdictional" and that "the FTCA's text, context, and relevant historical treatment prohibit equitable tolling of the statutory deadline." *Id.* at 48a, 51a. But he equitably construed respondent's court filings to render her claim timely and, thus, concurred in the judgment. *Id.* at 48a-52a.

c. Judges Tashima and Bea dissented in two separate opinions, which they both joined. App., *infra*, 52a-102a. Judge Tashima concluded that the statutory "history, once understood in full context, dispels any doubt that the FTCA's limitations period was intended to be jurisdictional." *Id.* at 52a. He explained that "the limitations provision was jurisdictional as of the original 1946 Act, for the grant of jurisdiction was expressly '[s]ubject to'—that is, 'contingent or conditional upon'—compliance with that provision." *Id.* at 55a-56a (brackets in original; internal quotation marks and citation omitted). And, he continued, Congress did not "intend[] to strip the limitations provision of its jurisdictional status only two years later," when "reorganizing Title 28" in the 1948 recodification. *Id.* at 56a-58a.

Judge Bea concluded that "Congress clearly expressed its intent that [Section] 2401(b) would have 'jurisdictional' consequences." App., *infra*, 102a. He explained that "[j]urisdictional treatment accords with

the statute's text," particularly Congress's command that late claims shall be "forever barred." *Id.* at 69a-84a, 102a. He also pointed to Section 2401(b)'s "context" in the "larger statutory scheme," including the administrative exhaustion requirement, as well as its "broad, system-related purposes." *Id.* at 93a, 97a-102a. Finally, he noted that this Court's "analysis of similar provisions" furnished further reason to construe Section 2401(b) as jurisdictional. *Id.* at 102a.

REASONS FOR GRANTING THE PETITION

A divided en banc Ninth Circuit has held that the FTCA's six-month time limit to file a tort suit for money damages against the United States, after final denial of a statutorily mandated administrative claim, is subject to equitable tolling. That decision is wrong for two reasons: (i) the six-month deadline is a jurisdictional limitation on the authority of the district court, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-134 (2008) (*John R. Sand & Gravel*), and (ii) there are, in any event, "good reason[s]" to think "that Congress did *not* want the equitable tolling doctrine to apply" to the FTCA's time limits, *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). The Ninth Circuit's erroneous decision further perpetuates widespread confusion and conflict in the courts of appeals. As a result of adverse decisions in some circuits, and unsettled law in others, the United States is routinely forced to expend substantial resources litigating fact-intensive assertions of equitable tolling and defending against untimely claims. This Court's intervention is needed to enforce the jurisdictional limitations and mandatory deadlines Congress prescribed, to provide clarity in an area that has been

mired in uncertainty, and to relieve the attendant burdens on the United States and the courts.[2]

A. The FTCA's Six-Month Suit-Filing Deadline Is Not Subject To Equitable Tolling

The court of appeals erred by holding that the FTCA's six-month deadline for filing a civil action for money damages against the United States, after final denial of a statutorily mandated administrative claim, is subject to equitable tolling. That holding cannot be squared with the statute's text, structure, history, and purpose, and it does not follow from this Court's precedents. The bar to filing an untimely civil action is a jurisdictional limitation that does not admit of equitable exceptions. *John R. Sand & Gravel*, 552 U.S. at 133-134. But even if that bar were nonjurisdictional, it is nonetheless mandatory and not subject to equitable tolling. That was certainly true at the time of the FTCA's enactment, and it is equally true today.

1. In *John R. Sand & Gravel*, this Court explained that there are two different types of limitations provisions: those that "seek primarily to protect defendants against stale or unduly delayed claims," and

---

[2] The United States is simultaneously filing a petition for a writ of certiorari raising the same question with respect to the FTCA's two-year deadline for presenting a claim to the appropriate federal agency. See *United States* v. *June* (filed Mar. 7, 2014). In *June*, the Ninth Circuit relied entirely on the en banc decision here to hold the two-year time bar nonjurisdictional and subject to equitable tolling. No. 11-17776, 2013 WL 6773664 (Dec. 24, 2013). Because both time limits are codified in the same provision (28 U.S.C. 2401(b)), because there is substantial overlap in the arguments concerning equitable tolling, and because both questions are important, the United States recommends that the Court grant both petitions and consolidate the cases for briefing and argument.

those that "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal." 552 U.S. at 133. The former "typically permit courts to toll the limitations period in light of special equitable considerations." *Ibid.* The latter, "sometimes referred to" as "jurisdictional," are often read as "more absolute," such that courts are "forbidd[en]" from "consider[ing] whether certain equitable considerations warrant extending [the] limitations period." *Id.* at 133-134. The Court concluded that the Tucker Act's six-year limitations period is "this second, more absolute kind of limitations period." *Id.* at 134. The same is true here.

a. The text and history of the FTCA evidence Congress's clear intent to enact an absolute, jurisdictional time bar.

In 1946, "after nearly thirty years of congressional consideration," Congress enacted the FTCA, which vested district courts with exclusive jurisdiction to hear tort suits against the United States that fall within the statute's waiver of sovereign immunity. *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953). The FTCA filled a gap left by the Tucker Act, ch. 359, 24 Stat. 505, which as early as 1887 had allowed claims against the United States in "cases for damages not sounding in tort," but had left unaddressed the "large and highly important area" of tort claims for money damages against the sovereign. *Dalehite*, 346 U.S. at 25 n.10. Congress imposed a one-year limitation on the period during which such a tort suit against the United States could be brought: "Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued * * * an action is begun." Federal

Tort Claims Act (1946 Act), ch. 753, § 420, 60 Stat. 845.[3]

The text Congress chose for the FTCA's suit-filing bar is the same that it had long used to set deadlines for damages actions against the United States under the Tucker Act. See Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) ("every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court * * * within six years after the claim first accrues"); Judicial Code, ch. 231, § 156, 36 Stat. 1139; see also *John R. Sand & Gravel*, 552 U.S. at 135. And it is the same operative text this Court had repeatedly construed in Tucker Act suits against the United States as jurisdictional and not subject to equitable exceptions. See *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); *Kendall* v. *United States*, 107 U.S. 123, 125-126 (1883); see also *John R. Sand & Gravel*, 552 U.S. at 134-135 (citing cases); cf. *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898) (construing slightly different text in similar fashion); *de Arnaud* v. *United States*, 151 U.S. 483, 495-496 (1894) (same). Moreover, Congress expressly conditioned the grant of "exclusive jurisdiction" to the district courts over tort claims against the United States on the plaintiff's compliance with the time limitation for filing suit. See 1946 Act § 410(a), 60 Stat. 843-844 (granting jurisdiction over

---

[3] If the claim was for less than $1000, it could be "presented in writing to the Federal agency out of whose activities it arises" "within one year after such claim accrued." 1946 Act § 420, 60 Stat. 845. In those cases, the time to file suit was "extended for a period of six months from the date of mailing of notice" of the agency's "final disposition of the claim." *Ibid.*

tort claims against the United States "[s]ubject to the provisions of this title"); *id.* § 420, 60 Stat. 845 ("this title" included the bar to filing after the one-year period); see App., *infra*, 53a-54a (Tashima, J., dissenting).

The 1946 Congress thus surely intended to limit the FTCA's waiver of sovereign immunity from suits for money damages to be paid out of the federal Treasury by foreclosing the federal courts from exercising jurisdiction to adjudicate untimely actions. Based on this Court's longstanding precedent at that time, it had every reason to believe that its intent would be effectuated.

b. The question, then, is whether anything has changed between 1946 and today to warrant a different result. There have been changes, but the court of appeals was wrong to think that they alter the outcome.

First, in the general recodification of Title 28 in 1948, the FTCA's jurisdiction-granting provision was codified in Chapter 85 and most of the FTCA's other provisions were codified in Chapter 171. See Act of June 25, 1948 (1948 Act), ch. 646, sec. 1, §§ 1346, 2671-2680, 62 Stat. 933, 982-985. The jurisdictional provision was accordingly reworded to make jurisdiction "subject to chapter 17[1] of this title." *Id.* § 1346(b), 62 Stat. 933.[4] The FTCA's one-year deadline for filing suit was codified in Chapter 161. *Id.* § 2401(b), 62 Stat. 971.

The court of appeals relied on the fact that the time bars are no longer placed in a portion of the Code that

---

[4] As enacted, the reference was to Chapter 173, not Chapter 171; that scrivener's error was corrected the following year. See Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62.

addressed jurisdiction. App., *infra*, 23a-29a. But this Court has repeatedly made clear that changes resulting from the 1948 recodification—including changes in the Tucker Act's limitations provision that the Court has held to be jurisdictional—should not be given any substantive significance in statutory interpretation. See *John R. Sand & Gravel*, 552 U.S. at 136; *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 225-226 (1957); see also 1948 Act § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed."). Indeed, the time bar applicable to Tucker Act claims, 28 U.S.C. 2501, which this Court has repeatedly held to be a jurisdictional limitation, is set forth in a different chapter of Title 28 (Ch. 165) than the statutory provision that confers jurisdiction on the Court of Federal Claims, 28 U.S.C. 1491 (Ch. 91). Accordingly, the current placement of the FTCA's time bars is not probative of any intent by Congress to expand the district courts' jurisdiction to hear FTCA actions.

Second, Congress has since amended the FTCA by extending the suit-filing period to two years, Act of Apr. 25, 1949 (1949 Act), ch. 92, § 1, 63 Stat. 62; adding a mandatory requirement of prior presentation of the claim to the appropriate federal agency for a period of six months, Act of July 18, 1966, Pub. L. No. 89-506, § 2(a), 80 Stat. 306; and restructuring the time bars to account for that mandatory exhaustion, *id.* § 7, 80 Stat. 307. The time bars are now linked directly to the provisions governing prior presentation of claims to the agency, which are themselves treated as jurisdictional. See *McNeil* v. *United States*, 508 U.S. 106,

109-113 (1993) (affirming dismissal for lack of jurisdiction where tort action was prematurely filed before expiration of six-month period following presentation of claim to the agency); App., *infra*, 34a-35a; *Mader* v. *United States*, 654 F.3d 794, 805-808 (8th Cir. 2011); see also 28 U.S.C. 1346(b)(1) (District court jurisdiction is "[s]ubject to the provisions of chapter 171 of this title."); 28 U.S.C. 2675(a) (codified in Ch. 171). And the relevant statutory text remains unchanged. See 28 U.S.C. 2401(b) ("shall be forever barred"). In the intervening years, this Court again reaffirmed in *Soriano* v. *United States*, 352 U.S. 270 (1957), that the parallel Tucker Act limitations period is jurisdictional, that "conditions upon which the Government consents to be sued must be strictly observed," and that "exceptions thereto [will not] be implied." *Id.* at 271, 273, 276. The amendments to the FTCA following that reaffirmation thus reinforce the jurisdictional nature of the time bar.

Third, this Court has sought in recent years "'to bring some discipline to the use' of the term 'jurisdiction.'" *Sebelius* v. *Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (*Auburn Regionial*) (quoting *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011)). Although the Court has looked for a "clear statement" that a "rule is jurisdictional," it has not required "magic words." *Ibid.* (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515-516 (2011)). "[C]ontext, including this Court's interpretation of similar provisions," is "probative of whether Congress intended a particular provision to rank as jurisdictional." *Ibid.* (quoting *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010)). And "Congress is free to attach the conditions that go with the jurisdictional label to a rule that

[the Court may] prefer to call a claim-processing rule." *Henderson*, 131 S. Ct. at 1203.

That is precisely what Congress did here. Section 2401(b) contains emphatic language ("shall be forever barred") that was patterned after the jurisdictional limitation on Tucker Act suits (*John R. Sand & Gravel*, 552 U.S. at 134-139) and historically linked to the FTCA's jurisdiction-granting provision (see pp. 13-14, *supra*). Moreover, like the limitations period in the Tucker Act, the FTCA's time bars "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve * * * broader system-related goal[s]." *John R. Sand & Gravel*, 552 U.S. at 133. They "limit[] the scope of a governmental waiver of sovereign immunity," *ibid.*, and they do so for actions against the United States itself for money damages, which are at the very core of the sovereign's immunity from suit. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (FTCA "waives the immunity of the United States and * * * in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."); cf. App., *infra*, 33a n.12 (acknowledging that this Court's more recent cases on jurisdiction "were not lawsuits in federal court against the federal government" for money damages and may not implicate "parallel sovereign immunity concerns").

The FTCA "governs the processing of a vast multitude of claims." *McNeil*, 508 U.S. at 112. As this Court recognized in *McNeil*, "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *Ibid.* Because the FTCA's six-month suit-

filing deadline is thus a "more absolute," "jurisdictional" time bar, it is not subject to equitable tolling. See *Auburn Regional*, 133 S. Ct. at 824 (if a time bar is "jurisdictional," there can "be no equitable tolling"). The court of appeals erred in holding otherwise.[5]

2. The court of appeals erred in subjecting the FTCA's six-month time bar to equitable tolling for a further reason. As the court of appeals recognized, even if a limitations period "is not jurisdictional, tolling may still be precluded." App., *infra*, 15a; see *Auburn Regional*, 133 S. Ct. at 826-828 (holding that nonjurisdictional time bar is not subject to equitable tolling). Here, there are "good reason[s] to believe that Congress did *not* want the equitable tolling doctrine to apply" to Section 2401(b). *Brockamp*, 519 U.S. at 350. Those reasons are sufficient to rebut any "presumption of equitable tolling." *Irwin* v. *Depart-*

---

[5] Although this Court has not considered whether the FTCA's time limits are jurisdictional, for decades after the FTCA's enactment, the courts of appeals uniformly characterized them as such and attached jurisdictional consequences to untimely filings. See *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 248 (1st Cir. 1990); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Peterson* v. *United States*, 694 F.2d 943, 945 (3d Cir. 1988); *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-742 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991); *Simon* v. *United States*, 244 F.2d 703, 704-706 (5th Cir. 1957); *Allgeier* v. *United States*, 909 F.2d 869, 871 (6th Cir. 1990); *Charlton* v. *United States*, 743 F.2d 557, 558-559 (7th Cir. 1984) (per curiam); *Schmidt* v. *United States*, 901 F.2d 680, 683 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991); *Mann* v. *United States*, 399 F.2d 672, 673 (9th Cir. 1968); *Anderberg* v. *United States*, 718 F.2d 976, 977 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984); *Adkins* v. *United States*, 896 F.2d 1324, 1325, 1326 (11th Cir. 1990) (per curiam); *Sexton* v. *United States*, 832 F.2d 629, 633 & n.4 (D.C. Cir. 1987).

ment of Veterans Affairs, 498 U.S. 89, 95-96 (1990); see *Lozano* v. *Alvarez*, No. 12-820 (Mar. 5, 2014), slip op. 8 ("[W]hether equitable tolling is available is fundamentally a question of statutory intent.").

Many of the reasons set forth above demonstrate that, even if not strictly jurisdictional, the six-month time bar is still not subject to equitable tolling. Congress used particularly "emphatic" language. *Brockamp*, 519 U.S. at 350; see 28 U.S.C. 2401(b) ("[A] tort claim against the United States * * * shall be *forever barred*.") (emphasis added). Congress modeled the FTCA's six-month suit-filing deadline on the limitations period in the Tucker Act that was (and is) not subject to equitable tolling. See pp. 11-12, 13, 16, *supra*. And Congress enacted (and amended) Section 2401(b) decades before "this Court decided *Irwin* and therefore" could not have been "aware that courts, when interpreting [the FTCA's] timing provisions, would apply" a presumption in favor of equitable tolling. *Holland* v. *Florida*, 560 U.S. 631, 646 (2010).

There are further reasons to conclude that Congress did not intend courts to apply general principles of equitable tolling to FTCA claims. During the decades-long process of drafting the FTCA, several of the bills introduced in Congress either contained a "reasonable cause" exception, a savings provision that tolled the time for filing a claim during periods of disability (such as infancy or mental incompetency), or both.[6] That

---

[6] See S. 1043, 74th Cong., 1st Sess. §§ 1(c), 202(a) (1935); S. 1833, 73d Cong., 1st Sess. §§ 1(c), 202(a) (1932); S. 4567, 72d Cong., 1st Sess. §§ 1(c), 202(a) (1932); H.R. 16429, 71st Cong., 3d Sess. §§ 22, 34 (1931); H.R. 15428, 71st Cong., 3d Sess. §§ 202(a), 304 (1930); S. 4377, 71st Cong., 2d Sess. §§ 202(a), 304 (1930); H.R. 9285, 70th Cong., 1st Sess. §§ 202(a), 304 (1928); S. 1912, 69th Cong., 1st

such exceptions were "absent from the Act itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon the language of the earlier bills." *United States* v. *Muniz*, 374 U.S. 150, 155-156 (1963).[7]

Three years after enacting the FTCA, when the one-year period that triggered the time bar proved to be too short, Congress extended the period to two years—again, without allowing for any tolling. See 1949 Act § 1, 63 Stat. 62. Nor did Congress provide for any case-specific exceptions until 1988 when, to remedy the inequity of a plaintiff's timely claim being barred because she sued the wrong party, Congress provided for a limited form of tolling—but only in specifically delineated circumstances. See 28 U.S.C. 2679(d)(5). And while a neighboring subsection (28 U.S.C. 2401(a)) provides for delayed accrual of anoth-

---

Sess. §§ 202(a), 304 (1926); H.R. 6716, 69th Cong., 1st Sess. §§ 202(c), 305 (1926).

[7] As with the Tucker Act, the remedy for individual cases of hardship was to come from Congress in the form of private bills, not from the courts. See *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940) ("If unusual cases of hardship arise, the claimant may still have recourse to a private bill, over which the claims committee would have jurisdiction.") (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen.); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 21 (1940) (noting that there are "private bills" under the Tucker Act and that there would "undoubtedly" be "private bills" under the FTCA) (statement of Alexander Holtzoff); see *Kosak* v. *United States*, 465 U.S. 848, 856 (1984) (describing "Judge Holtzoff" as "one of the major figures in the development of the [FTCA]").

er limitations period in the case of certain legal disabilities, Section 2401(b) notably does not. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Moreover, contrary to the court of appeals' assertion (App., *infra*, 41a), tort suits for money damages against the United States following final disposition of an administrative claim are not an "area of the law where equity finds a comfortable home." *Holland*, 560 U.S. at 647; see *id.* at 646 (finding presumption "strength[ened]" by "the fact that equitable principles have traditionally governed the substantive law of habeas corpus") (internal quotation marks and citation omitted); *Young* v. *United States*, 535 U.S. 43, 50 (2002) (finding *Irwin* presumption appropriate "when [Congress] is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence'") (citation omitted); cf. *Brockamp*, 519 U.S. at 352 (noting that tax law "is not normally characterized by case-specific exceptions reflecting individualized equities").

The FTCA's suit-filing period (six months) is also rather generous given that it follows the presentation of a claim to the appropriate federal agency and is triggered by the "mailing, by certified or registered mail, of notice of final denial of the claim by the agency," 28 U.S.C. 2401(b). See *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998). With such a readily ascertainable triggering event, there should be few if any occasions for equitable tolling even if it were permitted. But that does not mean that plaintiffs would not routinely assert equitable tolling to excuse a late filing. As the voluminous case law reveals (see Pt. B, *infra*), they will. Under the regime adopted by the

Ninth Circuit, numerous federal agencies would be forced "to respond to, and [sometimes] litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, * * * turn out to lack sufficient equitable justification." *Brockamp*, 519 U.S. at 352. Given the "broader system-related goal[s]" at stake, *John R. Sand & Gravel*, 552 U.S. at 133, including the need to examine and adjudicate a "vast multitude" of FTCA claims, *McNeil*, 508 U.S. at 112, that additional burden provides yet another reason why Congress would "have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so," *Brockamp*, 519 U.S. at 353.

B. The En Banc Ninth Circuit Decision Further Perpetuates Widespread Confusion And Conflict Among The Courts Of Appeals

Review of the decision of the divided en banc Ninth Circuit is warranted to restore the mandatory and jurisdictional force of the FTCA's time bars. For decades after the FTCA's enactment, the courts of appeals uniformly characterized the time bars in Section 2401(b) as jurisdictional and attached jurisdictional consequences to untimely filings. See note 5, *supra*. They were correct to do so, for all the reasons set forth above.

More recently, however, some courts of appeals have reconsidered (and, at times, ignored) that settled circuit precedent in light of intervening decisions of this Court. The issue has recurred with remarkable frequency. And the current state of the law can be best described as widespread conflict and confusion. The Ninth Circuit decision (which itself reverses prior

precedent) perpetuates that confusion. This Court's intervention is needed.

Categorizing the courts of appeals cases is no easy matter, but they can generally be divided into four groups. Three courts of appeals (including the Ninth Circuit) now hold that FTCA time limits are nonjurisdictional and are subject to equitable tolling. See App., *infra*, 1a-103a; *June* v. *United States*, No. 11-17776, 2013 WL 6773664 (Dec. 24, 2013) (two-year deadline for presentation of claim to agency); *Arteaga* v. *United States*, 711 F.3d 828 (7th Cir. 2013) (two-year deadline for presentation of claim to agency); *Santos* v. *United States*, 559 F.3d 189 (3d Cir. 2009) (two-year deadline for presentation of claim to agency).[8]

Four other courts of appeals now hold or (perhaps) suggest that the FTCA time limits are jurisdictional, but are nevertheless subject to equitable tolling—a position inconsistent with this Court's decisions concerning the nature of a jurisdictional limitation. See *T.L.* v. *United States*, 443 F.3d 956, 959-961, 963-964 (8th Cir. 2006) (holding two-year deadline "jurisdictional" but subject to equitable tolling); *Sanchez* v. *United States*, 740 F.3d 47, 53-54 (1st Cir. 2014) (noting that it had "previously opined that the FTCA's timeliness requirements are jurisdictional," while at

---

[8] As noted in the text, some of the courts of appeals' decisions involve the two-year deadline in 28 U.S.C. 2401(b) for presentation of a claim to the appropriate agency. The courts, however, have not generally distinguished between the two time bars, and the related question of whether equitable tolling is available for the two-year time bar is presented in the government's petition for a writ of certiorari in *June*, also filed with the Court today. See note 2, *supra*.

the same time "assum[ing] that equitable tolling can be applied to those deadlines"); *Kokotis* v. *USPS*, 223 F.3d 275, 278, 280-281 (4th Cir. 2000) (describing two-year deadline as "jurisdictional," but then considering argument for equitable tolling on its merits); *Harvey* v. *United States*, 685 F.3d 939, 947 (10th Cir. 2012) ("court lacks subject matter jurisdiction to proceed under the FTCA if a plaintiff fails to satisfy the FTCA's timing requirements set forth in [Section] 2401(b)") (citation omitted); *Benge* v. *United States*, 17 F.3d 1286, 1288 (10th Cir. 1994) (assuming arguendo that court may equitably toll six-month deadline).

Three circuits have expressly declared the question open and declined to decide it. See *Phillips* v. *Generations Family Health Ctr.*, 723 F.3d 144, 149 (2d Cir. 2013); *Motta* v. *United States*, 717 F.3d 840, 846 (11th Cir. 2013); *Norman* v. *United States*, 467 F.3d 773, 776 (D.C. Cir. 2006).

Two other circuits have conflicting case law that is difficult to reconcile. Compare *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185, 190-191 (5th Cir. 2011) (describing FTCA time limits as "jurisdictional" and not subject to equitable tolling) and *Young* v. *United States*, 727 F.3d 444, 447 & n.8 (5th Cir. 2013) (same), with *Perez* v. *United States*, 167 F.3d 913, 915-917 (5th Cir. 1999) (two-year deadline nonjurisdictional and subject to equitable tolling); see also *Bazzo* v. *United States*, 494 Fed. Appx. 545, 546-547 (6th Cir. 2012) (noting conflicting precedents); *Glarner* v. *United States*, 30 F.3d 697, 700-701 (6th Cir. 1994) (holding two-year deadline nonjurisdictional and subject to equitable tolling).

The current state of the law is thus unsettled and in a state of flux. The uncertainty has persisted for

some time. That state of affairs continues to impose a substantial burden on agencies, on courts, and on the United States Treasury. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be consolidated for briefing and argument with *United States* v. *June*, petition for cert. pending (filed Mar. 7, 2014).

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
MARK B. STERN
ANNE MURPHY
ADAM C. JED
Attorneys

MARCH 2014

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10-36136
D.C. No. 3:01-cv-00718-JO

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION, PLAINTIFFS-APPELLANTS

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted En Banc: Mar. 20, 2013
Filed: Oct. 9, 2013

OPINION

Before: ALEX KOZINSKI, Chief Judge, and HARRY PREGERSON, A. WALLACE TASHIMA, M. MARGARET MCKEOWN, WILLIAM A. FLETCHER, MARSHA S. BERZON, RICHARD R. CLIFTON, JAY S. BYBEE, CARLOS T. BEA,

MILAN D. SMITH, Jr., and MARY H. MURGUIA, Circuit Judges.

Opinion by Judge BERZON; concurrence by Chief Judge KOZINSKI; dissent by Judge TASHIMA; dissent by Judge BEA.

SUMMARY*

Federal Tort Claims Act

The en banc court reversed the district court's dismissal of a negligence claim brought against the United States and remanded, holding that the six-month statute of limitations in the Federal Tort Claims Act, 28 U.S.C. § 2401(b), may be equitably tolled and that equitable tolling was available under the circumstances presented in this case.

The court held that nothing in the text, context, or purpose of § 2401(b) clearly indicated that the Federal Tort Claims Act's six-month limitations period implicated the district courts' adjudicatory authority. The court therefore held that § 2401(b) is a nonjurisdictional claim-processing rule subject to the presumption in favor of equitable tolling set forth in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The court overruled the contrary holding in *Marley v. United States*, 567 F.3d 1030, 1038 (9th Cir. 2009). The court held that the presumption in favor of equitable tolling was not overcome in this case.

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The court held that plaintiff Kwai Fun Wong's claim, which was not filed within six months after the denial of her administrative claim by the INS, was rendered untimely because of external circumstances beyond her control. In light of these circumstances, the court concluded that equitable tolling properly applied to excuse Wong's late-filed amended complaint, and that her Federal Tort Claims Act claim against the United States therefore could proceed.

Concurring in the judgment, Chief Judge Kozinski agreed with the dissents that 28 U.S.C. § 2401(b) is jurisdictional, but stated that he could not dissent in this case because Wong had filed a reply memorandum reiterating her request for leave to file a second amended complaint after the INS denied her claim and before the six-month section 2401(b) window slammed shut.

Dissenting, Judge Tashima, joined by Judge Bea, stated he joined Judge Bea's dissenting opinion in full, but wrote separately to clarify that the Federal Tort Claims Act's legislative history dispelled any doubt that the Act's limitations provision was intended to be jurisdictional.

Dissenting, Judge Bea stated that he believed that Congress clearly expressed its intent that 28 U.S.C. § 2401(b) would limit the jurisdiction of federal courts by providing that tort claims "shall be forever barred" unless action is begun within the six-month period following denial of the administrative claim by the concerned agency, with no exceptions.

OPINION

BERZON, Circuit Judge:

We agreed to hear this case en banc to clarify whether the statute of limitations in 28 U.S.C. § 2401(b) of the Federal Tort Claims Act ("FTCA") may be equitably tolled. We hold that § 2401(b) is not "jurisdictional," and that equitable tolling is available under the circumstances presented in this case.

I. BACKGROUND

A. Statutory Background

The FTCA contains three timing rules that govern when a plaintiff may file a claim against the United States in the district court: First, 28 U.S.C. § 2675(a) establishes an administrative exhaustion requirement, which states that "[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." Section 2675 further provides that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim." *Id.*

Second, one statute of limitations in § 2401(b) sets a two-year deadline within which a claimant must present his claim "to the appropriate Federal agency . . . after such claim accrues." *Id.* § 2401(b); *see United States v. Kubrick*, 444 U.S. 111, 119-21 (1979).

Finally, § 2401(b) also establishes a second limitations period—that "[a] tort claim against the United States shall

be forever barred . . . unless action is begun within six months after the . . . final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

With this statutory framework in mind, we turn to the procedural history of this case, the material facts of which are not in dispute.

B. Facts

More than a decade ago, Kwai Fun Wong ("Wong") and Wu Wei Tien Tao Association ("the Association"), a religious organization, sued the United States and several Immigration and Naturalization Service ("INS") officials for claims arising out of Wong's detention. *See Wong v. INS (Wong I)*, 373 F.3d 952 (9th Cir. 2004); *Wong v. Beebe (Wong II)*, No. 07-35426 (9th Cir. June 4, 2010) (per curiam). The only remaining claim is one under the FTCA, alleging negligence against the United States based on the conditions of her confinement.

Wong and the Association filed their original complaint in the district court on May 18, 2001. That same day, Wong filed her negligence claim with the INS pursuant to the FTCA's administrative exhaustion requirement, 28 U.S.C. § 2675(a). Under § 2675(a), Wong was required to wait six months—until November 19, 2001—or until the INS denied the claim, before filing her negligence claim in the district court. *See* 28 U.S.C. §§ 1346(b)(1), 2675(a).

On November 14, 2001, Wong filed a motion in the district court seeking leave to file a Second Amended Complaint adding the negligence claim "on or after November 20, 2001"—*i.e.*, after the six-month waiting period re-

quired under § 2675(a) had expired. The INS issued a written decision denying Wong's administrative claim on December 3, 2001.

At that point, Wong had until June 3, 2002, to file her negligence claim in the district court. Here is why: Pursuant to § 2675(a), Wong was prohibited from filing her claim in the district court until after she presented it to the INS and the INS "finally decided [the claim] . . . in writing and sent [it] by certified or registered mail." 28 U.S.C. § 2675(a). Alternatively, § 2675(a) gave Wong the option to treat the INS's "failure . . . to make final disposition of [her] claim within six months after it [was] filed" as the "final denial of the claim." *Id.* Wong attempted to exercise that option when she filed her motion in the district court seeking leave to file her amended complaint "on or after November 20, 2001"—six months after she filed her claim with the INS. Had her motion been granted, then, pursuant to § 2401(b), Wong would have had six months—until May 20, 2002—to file her amended complaint with the added FTCA claim in the district court. *See id.* § 2401(b). As noted, however, the INS denied Wong's claim on December 3, 2001, thereby starting anew the clock on the six-months limitations period in § 2401(b). Thus, the relevant deadline for filing Wong's claim in the district court was June 3, 2002. *See Lehman v. United States*, 154 F.3d 1010, 1015 (9th Cir. 1998).

On April 5, 2002, more than five months after Wong filed her motion seeking leave to amend, the magistrate judge issued Findings and Recommendations ("F & R") recommending that Wong be permitted to file an amended complaint adding her FTCA claim. The district court did

not issue an order adopting the F & R until June 25, 2002, three weeks after the six-month filing deadline had expired.

Wong did file an amended complaint on August 13, 2002, which included the FTCA claim. The district court, relying on *Marley v. United States*, 567 F.3d 1030, 1038 (9th Cir. 2009), held that § 2401(b) was "jurisdictional," and that equitable tolling was therefore not available to excuse Wong's untimely filing of her claim. The district court dismissed Wong's FTCA claim for lack of jurisdiction. This appeal followed.

II. DISCUSSION

A. Applicability of Equitable Tolling to FTCA Claims

1. General Background

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), sets forth the "general rule . . . govern[ing] the applicability of equitable tolling in suits against the Government." *Id.* at 95. That case considered whether the "rule of equitable tolling" applied to an untimely Title VII claim brought against the government. *Id.* at 94-95. Noting that "[t]ime requirements in lawsuits between private litigants are customarily subject to equitable tolling," *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96 (internal quotation marks omitted).

Irwin's "general rule" is not without exception. Some statutes of limitation are "more absolute," and do not permit "court[s] to consider whether certain equitable considerations warrant extending a limitations period." *John*

R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008). "As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as 'jurisdictional.'" *Id.* at 134 (citing *Bowles v. Russell*, 551 U.S. 205, 210 (2007)).

The "jurisdiction" terminology used in the government-defendant equitable tolling context can, however, be misleading. In a series of recent cases, the Supreme Court has "pressed a stricter distinction between *truly* jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004) (emphasis added)). This distinction is critical for present purposes, because, while courts "[have] no authority to create equitable exceptions to jurisdictional requirements," *Bowles*, 551 U.S. at 214, nonjurisdictional claim-processing requirements remain "subject to [*Irwin's*] rebuttable presumption in *favor* of equitable tolling." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (internal quotation marks omitted).

Applying these principles to the particular statute of limitations here, our case law has come to contradictory results. *Alvarez-Machain v. United States (Alvarez-Machain I)*, 107 F.3d 696, 701 (9th Cir. 1996), held that "[e]quitable tolling is available for FTCA claims in the appropriate circumstances." Twelve years later, *Marley* held precisely the opposite, stating "that the statute of limitations in 28 U.S.C. § 2401(b) is jurisdictional and, conse-

quently, equitable doctrines that otherwise could excuse a claimant's untimely filing do not apply."[1] 567 F.3d at 1032; *see also Adams v. United States*, 658 F.3d 928, 933 (9th Cir. 2011) (applying *Marley*).

We agreed to hear this case to resolve the conflict between *Alvarez-Machain I* and *Marley*. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc). Doing so, we join with several other circuits in concluding that § 2401(b) is subject to equitable tolling. *See Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013); *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194-98 (3d Cir. 2009); *Perez v. United States*, 167 F.3d 913, 916-17 (5th Cir. 1999).

2. Jurisdictional vs. Nonjurisdictional Claim-Processing Rules

As a threshold matter, we must decide whether § 2401(b) is a "jurisdictional" rule, to which equitable doctrines cannot apply, or a nonjurisdictional "claim-proces-

---

[1] *Marley* dismissed *Alvarez-Machain I* as having "no precedential value" because the panel opinion in that case was vacated and the case was taken en banc. *See Marley*, 567 F.3d at 1037-38 (citing *Alvarez-Machain v. United States (Alvarez-Machain III)*, 284 F.3d 1039 (9th Cir. 2002)). But the opinion that was vacated by *Alvarez-Machain III* was not *Alvarez-Machain I*. Rather, it was a different opinion in the same case: *Alvarez-Machain v. United States (Alvarez-Machain II)*, 266 F.3d 1045 (9th Cir. 2001). Thus, *Alvarez-Machain I* was still good law when *Marley* was decided. The result was an intracircuit conflict, which we can resolve only through en banc proceedings. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc).

sing rule" subject to *Irwin's* presumption in favor of equitable tolling. Both *Alvarez-Machain I* and *Marley* were decided without the benefit of the Supreme Court's most recent decisions clarifying the difference between these two categories. Accordingly, before turning to § 2401(b) itself, we discuss the Court's efforts in recent years to "bring some discipline" to the "jurisdictional" label. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011); *see also Gonzalez*, 132 S. Ct. at 648.

The consequences of labeling a particular statutory requirement "jurisdictional" are "drastic." *Gonzalez*, 132 S. Ct. at 648. A court's "[s]ubject-matter jurisdiction can never be waived or forfeited," "objections [to the court's jurisdiction] may be resurrected at any point in the litigation," and courts are obligated to consider *sua sponte* requirements that "go[] to subject-matter jurisdiction." *Id.; see also Henderson*, 131 S. Ct. at 1202; *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1219 (9th Cir. 2009).

The Court has clarified in recent years that the term "'[j]urisdiction[al]' refers to a court's adjudicatory authority . . . [and] properly applies *only* to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010) (emphasis added) (internal quotation marks and citation omitted). Under this narrow interpretation, the term "jurisdictional" "refers [only] to a tribunal's power to hear a case." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009) (internal quotation marks omitted). So-called "claim-processing

rules," by contrast, "are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

"To ward off profligate use of the term 'jurisdiction,' [the Court has] adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)). Specifically, courts must now ask "whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement . . . 'courts should treat the restriction as nonjurisdictional in character.'" *Id.* (quoting *Arbaugh*, 546 U.S. at 515-16). Congress need not "incant magic words in order to speak clearly." *Id.* Rather, courts are to review a statute's language, "context, and relevant historical treatment" to determine whether Congress clearly intended a statutory restriction to be jurisdictional. *Reed Elsevier, Inc.*, 559 U.S. at 166.

Applying this bright-line rule in a spate of recent cases, the Court has held nonjurisdictional various statutory limitations on the substantive coverage of statutes or the procedures for enforcing them. *See, e.g., Union Pac. R.R.*, 558 U.S. at 81-82 (holding not jurisdictional a Railway Labor Act procedural rule requiring proof of a prearbitration settlement conference); *Reed Elsevier*, 559 U.S. at 164-66 (holding not jurisdictional the Copyright Act registration requirement); *Gonzalez*, 132 S. Ct. at 648-52 (holding not jurisdictional certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requiring issuance of a certificate of appeala-

bility indicating which specific issues sufficiently implicate the denial of a constitutional right); *but see Bowles*, 551 U.S. at 209-10 (holding jurisdictional a time limit for filing a notice of appeal in a civil case under 28 U.S.C. § 2107(c)).

As the issue here pertains to a statute of limitations, the Court's recent decisions applying the "clear statement" rule to statutory time limits are particularly instructive. *Henderson* held that "a veteran's failure to file a notice of appeal within the 120-day period" required under 38 U.S.C. § 7266(a) "should [not] be regarded as having 'jurisdictional' consequences." 131 S. Ct. at 1200. Canvassing the Court's recent case law discussing jurisdictional versus nonjurisdictional rules, *Henderson* explained that "[f]iling deadlines . . . are *quintessential* claim-processing rules." *Id.* at 1203 (emphasis added). "[E]ven if important and mandatory," such rules, "should not be given the jurisdictional brand." *Id.*

Turning to the text of § 7266, *Henderson* emphasized that the relevant provision "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [Veterans Court].'" *Id.* at 1204 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) (alteration in original)). Although "§ 7266 is cast in mandatory language"—providing that a claimant "*shall* file a notice of appeal . . . within 120 days"—*Henderson* "rejected the notion that 'all mandatory prescriptions, *however emphatic*, are . . . properly typed jurisdictional.'" *Id.* at 1204-05 (quoting *Union Pac. R.R.*, 558 U.S. at 81) (emphasis added). Indeed, as *Henderson* noted, Congress placed § 7266 "in a subchapter entitled 'Procedure,' " and not in the "Organization and Jurisdiction" subchapter of the statute, which "suggests Congress regarded the 120-

day limit as a claim-processing rule." *Id.* *Henderson* therefore found no clear statement indicating that § 7266 was "jurisdictional." *Id.*; *see also Holland*, 130 S. Ct. at 2560 (holding not jurisdictional AEDPA's statute of limitations in 28 U.S.C. § 2244(d)).

More recently, *Auburn Regional Medical Center* considered whether the Medicare Act's 180-day statutory deadline for filing an administrative appeal challenging Medicare reimbursements is jurisdictional. 133 S. Ct. at 821. The Court held that it is not. "Key to our decision," the Court explained, is that "filing deadlines ordinarily are not jurisdictional; indeed, we have described them as 'quintessential claim-processing rules.'" *Id.* at 825 (quoting *Henderson*, 131 S. Ct. at 1203).

Auburn Regional Medical Center went on to reject the notion that the 180-day limit was "jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Id.* at 825. Nor was it significant in *Auburn Regional Medical Center* that Congress "expressly made . . . *other* time limits in the Medicare Act" nonjurisdictional. *Id.* (emphasis added). Structural considerations such as these did not provide a "clear statement" that Congress intended the 180-day limit to be jurisdictional. The limitations provision was therefore "most sensibly characterized as a nonjurisdictional prescription." *Id.* at 826.

Finally, we applied a similar analysis in a recent en banc case addressing whether the exhaustion-of-remedies requirement of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(*l*), is jurisdictional. *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (2011) (en

banc). Based on the Supreme Court's recent line of cases "clarifying the difference between provisions limiting our subject matter jurisdiction, which cannot be waived . . . , and 'claims processing provisions,'" we concluded that § 1415(*l*) is not jurisdictional for three reasons. *Id.* at 867-69 (citing cases).

First, "we observe[d] that nothing in § 1415 mentions the jurisdiction of the federal courts." *Id.* at 869. "Second, nothing in the relevant jurisdictional statutes requires exhaustion under the IDEA." *Id.* at 870. "Without clearer instruction from Congress," we declined to "infer" a jurisdictional exhaustion-of-remedies requirement. *Id.* "Finally, we [could] find no reason why § 1415(*l*) should be read to make exhaustion a prerequisite to the exercise of federal subject matter jurisdiction." *Id.* To the contrary, we suggested that there were "many good reasons why" § 1415(*l*) should not qualify as jurisdictional. Most notably, determining whether a plaintiff had exhausted her remedies is an "inexact science," subject to various "fact-specific" questions such as whether exhaustion would be futile. *Id.* Thus, we summarized, § 1415(*l*) is not jurisdictional, as it "is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions." *Id.* at 870-71 (quoting *Reed Elsevier*, 559 U.S. at 166); *see also Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 979 (9th Cir. 2012) (holding that an employee's status as a plan "participant" is an element of his ERISA claim, not a jurisdictional limitation).

3. § 2401(b) Is Not Jurisdictional

Marley stated that "[r]esolution of the present case . . . [first] depends on how to categorize the six-month filing deadline of § 2401(b)"—as a "jurisdictional" requirement or as a nonjurisdictional "claim-processing rule." 567 F.3d at 1035. That is true, but only in the asymmetrical sense that if the deadline is jurisdictional, it cannot be tolled; as will appear, even if it is not jurisdictional, tolling may still be precluded by a sufficiently clear congressional expression of that restriction. We hold that § 2401(b) falls squarely in the claim-processing category, and so overrule *Marley's* contrary conclusion.

Several factors underlie our conclusion that § 2401(b) is nonjurisdictional.

a. *Language*

First, by its terms, § 2401(b) provides only that "[a] tort claim against the United States shall be forever barred unless . . . action is begun within six months" of mailing of notice of the final agency denial. 28 U.S.C. § 2401(b). That statement "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [federal courts]." *Henderson*, 131 S. Ct. at 1204; *see also Payne*, 653 F.3d at 869-70. Rather, § 2401(b) merely states what is ordinarily true of statutory filing deadlines: once the limitations period ends, whether extended by the application of tolling principles or not, a plaintiff is "forever barred" from presenting his claim to the relevant adjudicatory body. *See Kubrick*, 444 U.S. at 117.

Notably, although the exact language differs, § 2401(b) is the same in its lack of a reference to jurisdiction as

the general, non-tort statute of limitations contained in § 2401(a), which establishes a six-year filing deadline for "every civil action commenced against the United States." 28 U.S.C. § 2401(a). And *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), held subsection (a) nonjurisdictional, emphasizing that it "does not speak of jurisdiction, but erects only a procedural bar."[2]

Contrary to the government's assertion, § 2401(b) does not contain such unusually emphatic language that we may infer congressional intent to limit the adjudicatory authority of the federal courts from that language. We have held on prior occasions that statutes of limitations containing the phrase "forever barred" are subject to equitable tolling. For example, the 1955 Clayton Act Amendments provided that any action to enforce a right under §§ 15, 15a, and 15c of the Act "shall be *forever barred* unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (emphasis added); *see also* Pub. L. No. 137, 69 Stat. 283 (1955). *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 396-407 (9th Cir. 1980), determined that § 15b could be equitably tolled. *See also Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060-61 (9th Cir. 2012) (discussing tolling under § 15b); *cf. Rotella v. Wood*, 528 U.S. 549,

---

[2] *Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 872 (9th Cir. 2009), called into question *Cedars-Sinai's* continued vitality following the Supreme Court's decision in *John R. Sand & Gravel Co.*, 552 U.S. 130 (2008). That statement was made without the benefit of the Supreme Court's most recent decisions clarifying the distinction between jurisdictional and nonjurisdictional rules.

561 (2000) (indicating that equitable tolling may be available for civil claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which applies the same four-year statute of limitations in 15 U.S.C. § 15b).

Likewise, the 1947 amendments to the Fair Labor Standards Act ("FLSA")—which were enacted on the heels of the FTCA—provided that every action under the FLSA "shall be *forever barred* unless commenced within two years after the cause of action accrued" 29 U.S.C. § 255(a) (emphasis added); *see also* Pub. L. No. 40, § 6(b), 61 Stat. 84, 88 (1947). *Partlow v. Jewish Orphans' Home of Southern California*, 645 F.2d 757, 760-61 (9th Cir. 1981), *abrogated on other grounds by Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), held that this statute of limitations could be equitably tolled.

In various other statutes enacted in the mid-twentieth century, Congress included limitations provisions "forever barr[ing]" untimely claims. *See, e.g.*, Automobile Dealer Franchise Act of 1956, 84 Pub. L. No. 1026, § 3, 70 Stat. 1125 (1956), *codified at* 15 U.S.C. § 1223 ("Any action brought pursuant to this Act shall be *forever barred* unless commenced within three years after the cause of action shall have accrued.") (emphasis added); National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 111(b), 80 Stat. 718, 725 (1966), *as amended by* Pub. L. No. 103-272, 108 Stat. 745 (1994) ("Any action brought pursuant to this section shall be *forever barred* unless commenced within three years after the cause of action shall have accrued.") (emphasis added); Agricultural Fair Practices Act of 1967, Pub. L. No. 90-288, § 6(a), 82 Stat. 93, 95 (1967), *codified at* 7 U.S.C. § 2305(c) (same); Na-

tional Mobile Home Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, § 613, 88 Stat. 633, 707 (1974), *codified at* 42 U.S.C. § 5412(b) (same). Viewed against this backdrop, § 2401(b)'s "forever barred" language appears to be more a vestige of mid-twentieth-century congressional drafting conventions than a "clear statement" of Congress's intent to include a jurisdictional filing deadline in the FTCA.

Moreover, even if one does read the "forever barred" language in § 2401(b) as an especially emphatic limitation on FTCA claims, the Supreme Court's recent line of cases clarifying the jurisdictional/nonjurisdictional distinction make plain that not all "'mandatory prescriptions, *however emphatic*, are . . . properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pac. R.R.*, 558 U.S. at 81) (emphasis added); *see also Gonzalez*, 132 S. Ct. at 651; *Kontrick*, 540 U.S. at 454. And nothing in the text of § 2401(b) suggests that it is anything other than a straightforward filing deadline—a "quintessential claim-processing rule[]." *Henderson*, 131 S. Ct. at 1203.

Undeterred by the statute's silence as to whether the limitations period is jurisdictional (and by its placement in a section not directed at jurisdiction), Judge Bea offers a grand theory as to why § 2401(b) nonetheless clearly states a jurisdictional rule, positing that there are two types of statutes of limitations: "Plain Statutes of Limitations" and "Consequence Statutes of Limitations." Bea Dissent at 67, 71. The latter purportedly "provide mandatory consequences for failures to act according to their prescriptions," *id.* at 72, and so "require the courts to respond in a certain way to a party's failure to timely act." *Id.* Judge Bea's dissent goes on to maintain that *when-*

ever a limitations provision states that a claim "shall be . . . barred," or "forever barred," "Congress has spoken in jurisdictional terms" and the courts lack authority to adjudicate the claim—even if there is no mention of jurisdiction or placement in a jurisdiction provision. *Id.* at 72-74.

Judge Bea's consequential language approach is not one that the Supreme Court has ever articulated or relied upon in determining whether a particular limitations provision is jurisdictional. Indeed, the Court criticized this approach in *Irwin*, noting that, "[a]n argument can undoubtedly be made that the . . . language is more stringent . . . , but we are not persuaded that the difference . . . is enough to manifest a different congressional intent with respect to the availability of equitable tolling." 498 U.S. at 95. While the Court has held jurisdictional certain limitations provisions containing the phrase "shall be . . . barred," it has never relied on the notion of "consequential" language to do so.[3] Instead, the Court has repeatedly eschewed a "magic words" ap-

---

[3] Contrary to Judge Bea's assertion, *John R. Sand & Gravel* did not hold 28 U.S.C. § 2501 "jurisdictional" based on the "consequential" language of the statute. Rather, it held *Irwin's* presumption of equitable tolling rebutted based on the fact that "the Court had . . . previously provided a definitive interpretation" of § 2501. 552 U.S. at 137. Nor did *Bowles* hold that the limitations provision in 28 U.S.C. § 2107 was jurisdictional solely based on its "consequential" language; like *John R. Sand & Gravel*, *Bowles* rested largely on the "century's worth of precedent and practice in American courts" ranking "time limits for filing a notice of appeal" jurisdictional. 551 U.S. at 209 n.2.

proach to determining whether procedural requirements are jurisdictional, repeatedly taking a multifactor approach to the inquiry. *See Reed Elsevier*, 559 U.S. at 165; *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824.

Beyond that observation, we shall bypass ruling on whether Judge Bea's "consequential" language theory is a helpful construct in some circumstances. As with most attempts to create rigid dichotomous categories, the trick is not in devising the categories but in placing various circumstances into one or the other category. Although, according to Judge Bea, a limitations provision containing "shall . . . be barred" language "'set[s] forth an inflexible rule requiring dismissal,'" Bea Dissent at 75 (quoting *Holland*, 130 S. Ct. at 2560), the words relied upon simply do not have that import.

First, as to the word "shall," the Court consistently has rejected arguments "seiz[ing] on the word 'shall'" to suggest that "'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'" *Gonzalez*, 132 S. Ct. at 651 (quoting *Henderson*, 131 S. Ct. at 1205); *see also Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010) (holding that a statute's use of the word "shall" alone does not render statutory deadline jurisdictional).

Second, § 2401(b) does not in terms order *courts* to do anything, including dismiss any untimely claim. Like the exhaustion-of-remedies requirement at issue in *Payne*, "neither the word 'courts' nor the word 'jurisdiction' appears in [§ 2401(b)]." *Payne*, 653 F.3d at 869. Instead, the phrase "shall be . . . barred" is couched in the passive tense, and so could as well be directed to the plaintiff, barring him from filing the suit, as to the court, di-

recting it to bar the filing. The "shall be . . . barred" language of the six-month filing deadline therefore does not express "an inflexible rule requiring dismissal whenever its clock has run." *Holland*, 130 S. Ct. at 2560 (internal quotation marks omitted).

Third, the word "forever" in § 2401(b) cannot supply the missing link with regard to declaration of an inflexible rule. *See* Bea Dissent at 76-77. The word "forever" is most commonly understood as one focusing on *time*, not on scope or degree of flexibility in a static time frame. *See* Webster's New International Dictionary of the English Language 990 (2d ed. 1940) (defining "forever" to mean "[f]or a limitless time or endless ages; everlastingly; eternally," and "[a]t all times; always; incessantly"); Oxford English Dictionary (2013) (defining "forever" to mean "[a]lways, at all times; in all cases . . . [t]hroughout all time, eternally; throughout all past or all future time; perpetually"). As such, the term "forever" is most naturally read to emphasize that an untimely FTCA claim, once barred, is precluded permanently, not temporarily or until some later event occurs. A claimant therefore cannot refile the claim, nor may the time bar be lifted once it is imposed. So understood, the term "forever" does have a function in the statute, just not the one Judge Bea posits.[4] Thus, as the Fifth Circuit observed, "the use of the

---

[4] It is unclear how much weight the Bea dissent accords the term "forever." For the most part, the dissent categorizes statutes that simply use "shall be barred" terminology as within its self-created "consequence" category. See Bea Dissent at 72-75. But Judge Bea then devotes an entire section to the word "forever," and writes

words 'forever barred' [in § 2401(b)] is irrelevant to equitable tolling, which properly conceived does not resuscitate stale claims, but rather prevents them from becoming stale in the first place."[5] *Perez*, 167 F.3d at 916.

In sum, nothing in the language of § 2401(b)—including the term "shall . . . be barred," and the word "for-

---

that "[i]t is especially telling" that Congress included the term "forever barred" in § 2401(b), but did not do so in § 2401(a), "the very section that precedes the one here in issue." Bea Dissent at 76-79.

In fact, as we have noted, § 2401(a) does provide that an FTCA claim "shall be barred" unless it is filed within six years after the right of action accrues. *See* 28 U.S.C. § 2401(a); see also Act of June 25, 1948, chap. 646, 62 Stat. 971 (1948). Thus, the dissent seems to rest, at least in part, on the proposition that it is the word "forever" that transforms limitations language into the "consequential" variety. For reasons discussed in the text, the word "forever" cannot bear that weight.

[5] Judge Bea also takes issue with *Partlow* and *Mount Hood Stages*, *supra*, which, as discussed above, held statutes of limitation containing language similar to § 2401(b) subject to equitable tolling. Judge Bea questions the value of these precedents because they preceded the Court's more recent cases distinguishing between jurisdictional and nonjurisdictional rules. Bea Dissent at 84-87. As noted, however, later decisions by this Court and the Supreme Court affirm the availability of equitable tolling under 15 U.S.C. § 15b, the statute at issue in *Partlow*. See *Hexcel Corp.*, 681 F.3d at 1060-61; *Rotella*, 528 U.S. at 561. More fundamentally, these precedents undermine the notion that Congress intended through the use of magic words in the Clayton Act Amendments and FLSA limitations provisions to establish jurisdictional bars in statutes allowing for civil suits against private parties.

ever"—supplies a "clear statement" that Congress intended the six-month filing deadline to be jurisdictional.[6]

b. *Placement*

The "context" surrounding § 2401(b) likewise does not "clearly" indicate Congress's intent to "rank" this provision as jurisdictional. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824.

The jurisdiction-granting provision of the FTCA is located at 28 U.S.C. § 1346(b)(1) and provides that "[s]ubject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . under circumstances where the United States, if a private person, would be liable to the claimant." Section 1346(b)(1) makes no mention of the six-month filing dead-

---

[6] Judge Bea's reference to *Kendall v. United States*, 107 U.S. 123 (1883), as support for attributing jurisdictional meaning to the phrase "forever barred," Bea Dissent at 77-78, is misplaced. Though *John R. Sand & Gravel* did rely on *Kendall*, it did so not because of *Kendall*'s logic, but out of deference to "[b]asic principles of *stare decisis*," *John R. Sand & Gravel*, 552 U.S. at 139, as the statute in *John R. Sand & Gravel* was the same court of claims statute that *Kendall* (and *Finn v. United States*, 123 U.S. 227 (1887), and *Soriano v. United States*, 352 U.S. 270 (1957)) had already interpreted. *Id.* at 134-35. Indeed, *John R. Sand & Gravel* recognized that the older cases on which it relied were out of step with *Irwin*, but justified that reliance on "Justice Brandeis['s] . . . observ[ation] that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.* at 139 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting opinion)).

line in § 2401(b). Furthermore, while § 1346(b)(1) does cross-reference "the provisions of chapter 171," it does *not* cross-reference § 2401(b), which is located in chapter 161, not chapter 171. Thus, the FTCA's statute of limitations "is located in a provision separate from [the provision] granting federal courts subject-matter jurisdiction over [FTCA] claims." *Reed Elsevier*, 559 U.S. at 164 (internal quotation marks omitted); *see also Henderson*, 131 S. Ct. at 1205.

Further, even if § 1326(b) did mention the six-month filing deadline in § 2401(b), the Court's recent guidance on this subject indicates that an otherwise nonjurisdictional rule's location within a statutory scheme does not automatically transform the rule into a jurisdictional prerequisite. Thus, a rule "does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825; *see also Gonzalez*, 132 S. Ct. at 651.

Not satisfied with the plain language of § 1346(b), the government looks elsewhere for a "clear statement" of § 2401(b)'s jurisdictional import: the legislative history of the FTCA. According to the government, "[t]he FTCA's limitations provision is found outside of chapter 171 only as a happenstance of recodification." In his dissent, Judge Tashima likewise relies on the earlier version of the FTCA to conclude that "Congress provided a clear statement [that the FTCA's limitations provision was jurisdictional] when enacting the provision in 1946," and that statement remains clear today. Tashima Dissent at 59.

In the first place, and dispositively, it is improper to consider legislative history in this instance. "[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Consequently, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)) (internal quotation marks omitted). The current statutory language of § 1326(b), the FTCA jurisdictional provision, cross-references other provisions of the FTCA but not the chapter containing the limitations provision, § 2401(b). There is no ambiguity whatever in this regard; chapter 171 is not, and does not include, chapter 161, period.[7]

Secondly, even if we were to consider the FTCA's legislative history, we could find no "clear statement" as to jurisdiction. *See Exxon Mobil*, 545 U.S. at 568-69. Congress first enacted the FTCA in 1946 as Title IV of the Legislative Reorganization Act ("1946 Act"). *See* Pub. L. No. 79-601, tit. IV, 60 Stat. 812, 842-47 (1946). The provi-

---

[7] The fact that this statute "produce[d] an intracircuit split, several en banc dissents, and dozens of pages of analysis by the majority," Tashima Dissent at 56, does not mean that the cross reference to chapter 171 is itself ambiguous. While reasonable jurists may certainly debate the general equitable tolling question this case presents, the cross reference to chapter 171, and not to chapter 161, is plain as day.

sions of the FTCA were codified in chapter 20 of Title 28 of the United States Code. *See* 28 U.S.C. §§ 921-46 (1946).[8] As originally codified, the FTCA's grant of jurisdiction read:

> Subject to the provisions of this chapter, the United States district court for the district court wherein the plaintiff is resident or wherein the act or omission complained of occurred . . . shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only . . . on account of personal injury or death caused by the negligent or wrongful act or omission of

---

[8] The original limitations provision in Section 420 of the Act provided:

> Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued . . . it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued . . . an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

60 Stat. 812, 845. As originally enacted, the FTCA did not *require* claimants to exhaust their administrative remedies. That requirement was added in 1966. See 28 U.S.C. § 2401(b) (1994); H.R. Rep. No. 89-1532 at 6-7 (1966); S. Rep. No. 89-1327 at 2-3 (1966).

> any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 931(a) (1946). Congress recodified and reorganized all of Title 28 in 1948, and, in the course of doing so, placed the FTCA's limitations provision in its current location in chapter 161, while placing most of the other FTCA provisions formerly located in chapter 20 in chapter 171. Pub. L. No. 80-773 ("1948 Act"), 62 Stat. 869, 970-74 (1948); *id.* 62 Stat. 869, 982-85. The jurisdiction-granting provision was relocated to chapter 85 and codified at 28 U.S.C. § 1346(b). *Id.* at 933. Because § 1346(b) was no longer located in the same chapter as the other FTCA provisions, the "subject to" phrase was changed to refer to "the provisions of chapter 173 of this title." *Id.*

As Judge Tashima points out, the reference in the 1948 version of § 1346(b) to chapter 173 was a scrivener's error, as there was no chapter 173 of Title 28. Tashima Dissent at 53. A year later, Congress corrected the error, changing the language of § 1346(b) to read: "[s]ubject to the provisions of chapter 171." *See* Pub. L. No. 81-55, 63 Stat. 62 (1949). But that correction did nothing to erase the fact that the only cross-reference in the jurisdictional provision, § 1346(b), is to a chapter, chapter 171, which *does not* contain the FTCA limitations provisions.

Nor does the directive of the 1948 Act that we are not to "infer . . . a legislative construction from the chapter in which a provision appears" override the plain

terms of § 1346(b) as revised. No *inference* is required to conclude that the FTCA jurisdictional provision is no longer "subject to" the limitations section. Instead, one need only read § 1346(b) to determine that that is so; again, chapter 161 is not chapter 171, period. Thus, although the Court "does not presume that the 1948 revision worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed," *John R. Sand & Gravel Co.*, 552 U.S. at 136 (internal quotation marks omitted), that intent *was* clearly expressed when the cross-reference to § 1346(b) was revised to include many provisions of the FTCA but not the applicable limitations period.

Under Judge Tashima's "inference" approach to the clear statutory language, it would not have mattered what Congress wrote into the FTCA's jurisdictional grant in 1948 (and later corrected in 1949). Congress could have revised the statute to read "Subject to the provisions of chapter 171" (as it eventually did); "Subject to the provisions of chapter 171 and 161"; or "Subject to the provisions of chapter 161," and Judge Tashima's interpretation would still be the same—"subject to any provision of the original FTCA as codified in 1946."[9]

---

[9] We note as well that the proposition that *any* requirement that the FTCA's jurisdictional grant is "subject to" is automatically a jurisdictional prerequisite is a questionable one. The fact that § 1326(b) requires plaintiffs to comply with certain requirements to file a claim against the United States does not mean that each and every one of those requirements concern "a tribunal's power to hear a case." *Union Pac. R.R.*, 558 U.S. at 81. Indeed, "subject to" or-

We hold, instead, that § 1346(b) means what it says: that the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States[] for money damages," "[s]ubject to the provisions of chapter 171." 28 U.S.C. § 1346(b). The FTCA's legislative history cannot supply a "clear statement" to the contrary. Accordingly, there is no contextual reason to think that the limitations period provisions are jurisdictional.[10]

---

iginally encompassed section 411 of Title IV, which made the Federal Rules of Civil Procedure applicable in FTCA cases; under Judge Tashima's approach, compliance with the Federal Rules would have thus been a jurisdictional requirement. "Subject to" is more sensibly read to mean that litigants have to follow the prescribed procedures, not that each and every one of those procedures, if not followed, gives rise to the "drastic" consequences that follow from lack of subject matter jurisdiction. *See Gonzalez*, 132 S. Ct. at 648. We have never held otherwise. And where the Supreme Court has held a specific provision in chapter 171 jurisdictional, it has not done so because every rule in chapter 171 is a jurisdictional requirement. *See McNeil v. United States*, 508 U.S. 106, 111-13 (1993); *Smith v. United States*, 507 U.S. 197, 199 (1993).

[10] Aside from our holdings in *Brady v. United States*, 211 F.3d 499, 502-03 (9th Cir. 2000), and *Lesoeur v. United States*, 21 F.3d 965, 967 (9th Cir. 1994), which held, respectively, that the administrative exhaustion requirement in § 2675(a) and discretionary function exception in § 2680(a) are jurisdictional, we have not addressed whether any of the other provisions in chapter 171 of the FTCA set forth jurisdictional requirements. In holding § 2401(b) nonjurisdictional, we express no views as to whether the other provisions located in chapter 171 are jurisdictional.

c. *Exceptions*

In holding § 2401(b) "jurisdictional," *Marley* found it significant that Congress "explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b)." 567 F.3d at 1037. Section 2401(a) provides, in relevant part, that an "action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. § 2401(a). *Marley* reasoned that "[b]ecause Congress chose to extend the time limit in § 2401(a) under certain circumstances, but did not include any exceptions to the limitations period of § 2401(b), we must conclude that Congress intended the deadlines of § 2401(b) to be adhered to strictly." 567 F.3d at 1037 (emphasis omitted).

That conclusion cannot be squared with *Auburn Regional Medical Center*, which rejected the argument that a statutory time limit "should be viewed as jurisdictional because Congress could have expressly made the provision nonjurisdictional, and indeed did so for other time limits in the [statute]." 133 S. Ct. at 825. Although "Congress's use of certain language in one part of the statute and different language in another can indicate that different meanings were intended," that interpretive principle cannot, without more, provide the "clear statement" required to classify § 2401(b) as "jurisdictional." *Id.* at 825-26 (internal quotation marks omitted); *see also Santos*, 559 F.3d at 195-96.

d. *Earlier Cases*

Finally, unlike in *Bowles*, 551 U.S. at 210-13, and *John R. Sand & Gravel*, 552 U.S. at 137-39, there has not been a

venerable, consistent line of cases treating the FTCA limitations period as jurisdictional counseling against switching gears now. Although we have held that § 2401(b) is jurisdictional, *see Marley*, 567 F.3d at 1035-36 (citing *Berti v. V.A. Hosp.*, 860 F.2d 338, 340 (9th Cir. 1988); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Blain v. United States*, 552 F.2d 289, 291 (9th Cir. 1977) (per curiam); *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968)), unlike in *Bowles* and *John R. Sand & Gravel*, there is no Supreme Court precedent on the question. *See Reed Elsevier*, 559 U.S. at 173-74 (Ginsburg, J. concurring) (rejecting citation to non-Supreme Court precedent because *Bowles* and *John R. Sand & Gravel* "relied on longstanding decisions of *this* Court typing the relevant prescriptions 'jurisdictional'") (emphasis in original). And we have also held otherwise in *Alvarez-Machain I*, 107 F.3d 696.

Further, the pre-*Alvarez-Machain I* cases cited in *Marley* preceded both *Irwin* and the Supreme Court's more recent decisions clarifying the distinction between jurisdictional and nonjurisdictional rules. Indeed, our pre-*Alvarez-Machain I* decisions are emblematic of the "drive-by jurisdictional rulings" to which the Supreme Court has cautioned against giving "precedential effect" in its more recent cases. *See Arbaugh*, 546 U.S. at 511. For example, *Berti*, a three-page opinion, labels § 2401(b) "jurisdictional," but provides no analysis as to the meaning or significance of that term.[11] *See Berti*, 860 F.2d at 340.

---

[11] *Blain*, *Mann*, and *Augustine*, cited in *Marley*, addressed the two-year administrative claim limitation period in § 2401(b), not the

Accordingly, this is certainly not the "exceptional [case] in which a 'century's worth of precedent and practice in American courts' rank [the] time limit as jurisdictional." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (quoting *Bowles*, 551 U.S. at 209 n.2).

e. *Purpose*

Finally, with regard to the particular role of the FTCA's six-month limitations period for filing suit we "find no reason why [§ 2401(b)] should be read . . . [as] a prerequisite to the exercise of federal subject matter jurisdiction." *Payne*, 653 F.3d at 870.

First, the consideration that the FTCA authorizes suits against the federal government does not, standing alone, supply such a reason. In so concluding, "[w]e . . . have in mind that the [FTCA] waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Kubrick*, 444 U.S. at 117-18; *see also Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 287 (1983). But the fact that the FTCA is predicated on a sovereign immunity waiver does not make the six-month filing deadline a jurisdictional prerequisite, not subject to equitable tolling. Although waivers must be "strictly construed," *Irwin* explained that "[o]nce Congress has made such a waiver, . . . making the rule of equitable tolling applicable to suits against

---

six-month post-exhaustion period. *See Blain*, 552 F.2d at 291; *Mann*, 399 F.2d at 673; *Augustine*, 704 F.2d at 1077.

the Government, in the same way that is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U.S. at 94-95.

John R. Sand & Gravel, 552 U.S. 130, is not to the contrary. That case did note that "[t]he Court has often read the time limits of these [sovereign immunity waiver] statutes as more absolute," *id.* at 133-34, and "has sometimes referred to the time limits in such statutes as 'jurisdictional.'"[12] *Id.* at 133-34 (citing *Bowles*, 551 U.S. at 210). But *John R. Sand & Gravel* did not turn on any bright-line distinction between statutes of limitation that "protect a defendant's case-specific interest in timeliness," and those "limiting the scope of a governmental waiver of sovereign immunity." 552 U.S. at 133-34. Instead, *John R. Sand & Gravel* reiterated and applied *Irwin*'s presumption that equitable tolling applies to statutes of limitations in suits against the government, distinguishing *Irwin* on the grounds that "*Irwin* dealt with a different limitations statute [that] . . . , while similar to [§ 2501] in language, is unlike [§ 2501] in the key respect that the Court had not previously provided a definitive interpretation." *Id.* at 137.

---

[12] The Court's other recent cases discussing the distinction between jurisdictional and nonjurisdictional statutes, including *Auburn Regional Medical Center*, 133 S. Ct. 817, *Gonzalez*, 132 S. Ct. 641, *Henderson*, 131 S. Ct. 1197, *Holland*, 130 S. Ct. 2549, and *Bowles*, 551 U.S. 205, also involve lawsuits against governmental entities. But they were not lawsuits in federal court against the federal government, and so may not raise precisely parallel sovereign immunity concerns.

Second, there is no reason to think § 2401(b) more concerned with "achiev[ing] a broader system-related goal" than simply with protecting the government's "case-specific interest in timeliness." *Id.* at 133. *Holland* is instructive in this regard. As noted above, *Holland* held that AEDPA's statute of limitations in 28 U.S.C. § 2244(d) is not jurisdictional, and therefore is "subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" 130 S. Ct. at 2560 (quoting *Irwin*, 498 U.S. at 95-96). Doing so, *Holland* rejected the argument "that equitable tolling undermines AEDPA's basic purposes." *Id.* at 2562. While acknowledging AEDPA's systemic goal of "eliminat[ing] delays in the federal habeas review process," *Holland* emphasized that AEDPA "[does] not seek to end every possible delay at all costs." *Id.* *Holland* therefore declined to read § 2244(d) as indicating "congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Id.*

Section 2401(b) likewise does not evince congressional intent to foreclose the application of equitable principles for the sake of "broader system-related goals." As *Kubrick* explained, § 2401(b)'s "obvious purpose[] . . . is to encourage the prompt presentation of claims." 444 U.S. at 117. That is consistent "with the general purpose of statutes of limitations: 'to protect defendants against stale or unduly delayed claims.'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (quoting *John R. Sand & Gravel*, 552 U.S. at 133).

McNeil v. United States, 508 U.S. 106 (1993), does not detract from our conclusion. *McNeil* strictly construed the administrative exhaustion requirement in 28 U.S.C. § 2675(a), holding that an FTCA action filed before ex-

haustion had been completed could not proceed in the district court even where the litigation had not substantially progressed. 508 U.S. at 111-13. The exhaustion requirement, unlike the § 2401(b) limitations period, *is* tied by explicit statutory language to jurisdiction, and was deemed "jurisdictional" in *Brady v. U.S.*, 211 F.3d 499, 502 (9th Cir. 2000). The "straightforward statutory command" in § 2675(a), *McNeil* explained, served "[t]he interest in orderly administration of this body of litigation." *Id.* at 112.

Judge Bea maintains that *McNeil*'s concern about the "orderly administration of [FTCA] litigation" with respect to the exhaustion-of-remedies requirement in § 2675(a) compels us also to treat § 2401(b)'s six-month filing deadline as jurisdictional. We disagree. Strict enforcement of an exhaustion requirement serves to assure a particular administrative interest—namely, the interest in assuring that agency officials have a full opportunity to investigate and consult internally with regard to claims for compensation due to negligence by agency employees. Further, that purpose recognized by the Supreme Court in *McNeil* —reducing court congestion by keeping claims out of court until an administrative agency has had a chance to settle them—is not implicated by § 2401(b)'s sixth-month post-exhaustion limitations period. *See id.* at 111-12, 112 n.8. Where agency exhaustion is required, there is notice of the claim and of the need for information collection, as well as an opportunity to settle the claim, well before suit is filed in court.

In short, nothing in the text, context, or purpose of § 2401(b) clearly indicates that the FTCA's six-month limitations period implicates the district courts' adjudica-

tory authority. We therefore hold that § 2401(b) is a nonjurisdictional claim-processing rule subject to the presumption in favor of equitable tolling, and so overrule *Marley*'s contrary holding.

4. The *Irwin* Presumption in Favor of Equitable Tolling

Having concluded that § 2401(b) is a nonjurisdictional statute of limitations subject to *Irwin*'s presumption in favor of equitable tolling, we must next determine whether that presumption has been overcome in this case. *See Holland*, 130 S. Ct. at 2560; *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1098 (9th Cir. 2005). "It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (internal quotation marks and citations omitted). We must therefore ask whether "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply" to § 2401(b). *United States v. Brockamp*, 519 U.S. 347, 350 (1997). There is no such reason.

As an initial matter, we note that the *Irwin* presumption regarding the tolling of limitations periods in suits against the federal government is particularly strong in FTCA cases. Various provisions of the FTCA confirm that suits against the government are to be treated no differently than suits against private defendants.

For example, § 2674, governing the "Liability of [the] United States," states that "[t]he United States shall be liable, respecting the provisions of this title relating to tort

claims, *in the same manner and to the same extent as a private individual under like circumstances*." 28 U.S.C. § 2674 (emphasis added); *see Arteaga*, 711 F.3d at 833. Likewise, § 1346(b)(1) grants the district courts exclusive jurisdiction over civil actions against the government "under circumstances where the United States, *if a private person*, would be liable." *Id.* § 1346(b)(1) (emphasis added). Thus, as a general matter, the FTCA places suits against the United States on equal footing with suits against private individuals.

The *Irwin* presumption is further strengthened by the "discovery" rule applicable to § 2401(b): A plaintiff is required to file her claim with the relevant federal agency "within two years after such claim accrues," *id.* § 2401(b). Applying the common law discovery rule—which does not appear in the statute—courts view a claim as "'accru[ing]' within the meaning of [§ 2401(b)] when the plaintiff knows both the existence and the cause of his injury." *See Kubrick*, 444 U.S. at 119-21 and n.7. As a practical matter, this common law rule "extends the statute of limitations by delaying the date on which it begins to run." *Arteaga*, 711 F.3d at 833. Application of a common law discovery rule not enunciated in the statute to aspects of § 2401(b) reinforces the notion that the FTCA's statutes of limitations admit of common law exceptions.

Without the discovery rule, the deadlines contained in § 2401(b) would closely resemble a "statute of repose": "a fixed, statutory cutoff date, usually independent of any variable, such as claimant's awareness of a violation." *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). "[L]ike a jurisdictional prerequisite," a statute of repose is not subject to equitable tolling. *Albillo-DeLeon*, 410 F.3d

at 1097 n.5; *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 534-36 (9th Cir. 2011). While a nonjurisdictional statute of limitations "bars plaintiff[s] from bringing an already accrued claim after a specified period of time," a statute of repose "terminates a right of action after a specific time, even if the injury has not yet occurred." *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n.7 (9th Cir. 2005).[13]

Far from setting a fixed cutoff date, § 2401(b) "is in the traditional form of a statute of limitations." *Johnson v. Aljian*, 490 F.3d 778, 781 n.12 (9th Cir. 2007). As such, just as it is subject to the common law discovery rule, so the presumption favoring equitable tolling applies.

That § 2401(b) acts as a condition on the FTCA's waiver of sovereign immunity does not alter our conclusion, essentially for the same reasons discussed earlier with regard to the jurisdictional question. With or without a waiver of sovereign immunity, the key inquiry, following *Irwin*, remains whether equitable tolling "is inconsistent

---

[13] In *Munoz*, for example, we held that section 203 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997), was a statute of repose, because it contained "fixed, statutory cutoff date[s]" requiring an alien to file an application for relief by April 1, 1990 or December 31, 1991. The statute did "'not await a specific event to start the deadline clock,'" but "'[r]ather . . . served as the endpoint of the definite time period in which Congress would permit [applicants] to file applications.'" 339 F.3d at 957 (quoting *Iacono v. Office of Pers. Mgmt.*, 974 F.2d 1326, 1328 (Fed. Cir. 1992) (emphasis omitted)).

with the text of the relevant statute."[14] *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *see also John R. Sand & Gravel*, 552 U.S. at 139. For the reasons already discussed, nothing in § 2401(b) suggests that it is inconsistent with equitable tolling. To the contrary, the FTCA goes out of its way in its efforts to treat the United States the same as private tort defendants.

Neither *Brockamp*, 519 U.S. 347, nor *Beggerly*, 524 U.S. 38, two cases in which the Supreme Court held the *Irwin* presumption rebutted, indicates that the same conclusion is appropriate here. *Brockamp* held that a stat-

---

[14] The Supreme Court has, at times, indicated that equitable considerations are less likely to apply to limitations provisions limiting the scope of a governmental waiver of sovereign immunity. *See John R. Gravel & Sand*, 552 U.S. at 133-34; *Soriano*, 352 U.S. at 275-77. Most notably, *Soriano* declined to equitably toll the statute of limitations for filing a claim in the Court of Claims, 28 U.S.C. § 2501, explaining "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *See* 352 U.S. at 275-76.

Noting that the Court's "previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent," *Irwin* discussed the result in *Soriano*, and concluded that its holding did not apply to the thirty-day time limit in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16(c). *Irwin*, 498 U.S. at 94-95. Instead, *Irwin* explained, "this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government," namely, the rebuttable presumption in favor of tolling. *Id.* at 95-96. In announcing this "general prospective rule," *John R. Sand & Gravel*, 552 U.S. at 137, *Irwin* did not expressly overrule *Soriano*, but made clear that *Soriano* is not to be read to proscribe the application of equitable doctrines to limitations on waivers of sovereign immunity in every case.

ute of limitations for filing tax refund claims foreclosed application of equitable tolling, citing as evidence of Congress's intent the statute's "highly detailed," "technical," and "unusually emphatic form." 519 U.S. at 350. *Brockamp* further emphasized that "tax law," the subject matter of the statute of limitations in that case, "is not normally characterized by case-specific exceptions reflecting individual equities," given the more than "200 million tax returns" and "more than 90 million refunds" processsed each year. *Id.* at 352. *Beggerly*, in turn, determined that an "unusually generous" twelve-year statute of limitations was "incompatible" with equitable tolling, in large part because the underlying subject matter concerned "ownership of land," and equitable tolling would "throw a cloud of uncertainty over [property] rights." 524 U.S. at 48-49.

For reasons similar to those relied upon in the Supreme Court's more recent *Holland* decision, the statute of limitations here "differs significantly from the statutes at issue in [*Brockamp*] and [*Beggerly*]." *Holland*, 130 S. Ct. at 2561. *Holland* held AEDPA's one-year statute of limitations in 28 U.S.C. § 2244(d) nonjurisdictional and "subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" *Id.* at 2560 (quoting *Irwin*, 498 U.S. at 95-96) (emphasis omitted). Applying that presumption, *Holland* explained that, unlike the statute of limitations at issue in *Brockamp*, § 2244(d) "does not contain language that is 'unusually emphatic,' nor does it 're-iterat[e]' its time limitation." *Id.* at 2561. Moreover, "unlike the subject matters at issue in both *Brockamp* and *Beggerly*—tax collection and land claims—AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity

finds a comfortable home." *Id.* Accordingly, "neither AEDPA's textual characteristics nor the statute's basic purposes 'rebut' the basic presumption set forth in *Irwin*." *Id.* at 2562.

The same conclusion applies to § 2401(b). As discussed above, the FTCA's limitations provision is not cast in particularly emphatic language given its provenance; nor is it unusually generous. *See* Part II.A.3. And, unlike the limitations provision in *Brockamp*, § 2401(b) does not "reiterate[] its limitations several times in several different ways." *Brockamp*, 519 U.S. at 351. Instead, § 2401(b) "reads like an ordinary, run-of-the-mill statute of limitations," reflecting its period of enactment. *Holland*, 130 S. Ct. at 2561.

Furthermore, like the statute of limitations at issue in *Holland*, § 2401(b) "pertains to an area of the law where equity finds a comfortable home." *Id.* As *Irwin* noted, "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" 498 U.S. at 95. And, as discussed above, the FTCA places tort suits against the United States on equal footing with tort suits against private individuals, exposing the government to liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. That Congress saw fit to include a time limit on such claims without any specific limitations on tolling indicates, if anything, that it intended to allow the operation of normal equitable tolling principles that would be applicable in ordinary tort suits against private individuals, not that it harbored an intention otherwise.

Rouse v. United States Department of State, 567 F.3d 408 (9th Cir. 2009) (analyzing the Privacy Act's two-year statute of limitations, 5 U.S.C. § 552a(g)(5)), reached a similar result to the one we reach here. In that case, a U.S. citizen sued the "U.S. Department of State under the Privacy Act for damages arising from his imprisonment in a foreign country." 567 F.3d at 412. *Rouse* held, first, that the citizen's claims were "sufficiently similar to traditional tort actions such as misrepresentation and false light to warrant the application of *Irwin*'s rebuttable presumption." *Id.* at 416. Next, *Rouse* distinguished § 552a(g)(5) from the limitations provisions at issue in *Brockamp* and *Beggerly*, noting that § 552a(g)(5) lacked "detail[ed], . . . technical language" and did not concern an "area[] of law where the running of a defined statute of limitations is of special importance.'" *Id.* at 417 (first alteration in original) (internal quotation marks omitted). *Rouse* therefore concluded that the *Irwin* presumption had not been rebutted in that case.

Finally, for the reasons similar to those we surveyed in declining to infer § 2401(b)'s "jurisdictional" status from other FTCA provisions and subsection (a) of § 2401, *see supra* Part II.A.3, Congress's decision to include explicit exceptions in other FTCA limitations provisions does not rebut the *Irwin* presumption.[15] As *Holland* explained,

---

[15] For example, the revisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-964, §§ 5-6, 102 Stat. 4563, 4564-65 (1988), to 28 U.S.C. § 2679(d)(5), provide that an action dismissed under the exhaustion requirement in 28 U.S.C. § 2675(a) is considered timely un-

the fact that a statute "is silent as to equitable tolling while containing one provision that expressly refers to a different kind of tolling" does not foreclose the application of equitable tolling. 130 S. Ct. at 2561-62; *see also Young*, 535 U.S. at 53 (rejecting the argument that an "express tolling provision, appearing in the same subsection as the [limitations] period, demonstrates a statutory intent *not* to toll the [limitations] period").

In short, the *Irwin* presumption is not overcome. Nothing in § 2401(b)'s text or context indicates that Congress intended to preclude courts from *ever* applying equitable tolling to claims filed outside of the six-month limitations period.

B. Wong Is Entitled to Equitable Tolling

Concluding, as we do, that equitable adjustment of the limitations period in § 2401(b) is not prohibited, does not decide under what circumstances equitable tolling may be appropriate. Whether a particular untimely claim may be excused for a particular reason varies with the reason. We decide only that under the circumstances presented here, the usual principles governing equitable tolling apply and we can find no "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350.

We assume for present purposes, without deciding, that Wong's FTCA claim was filed in the district court too

---

der 28 U.S.C. § 2401(b) if the administrative claim would have been timely had the claim been filed on the date of commencement of the civil action. See 28 U.S.C. § 2679(d)(5).

late. In doing so, we pause to note that whether this is so depends on: (1) whether the claim could be considered filed in the district court at a point earlier than the amendment actually adding the FTCA claim was filed; and (2) whether, if so, the relevant filing date was (a) November 14, 2001, the date Wong's formal motion to file the amended complaint was filed; (b) November 20, 2001, the date as of which the motion to file the amended complaint requested that the complaint be amended; or (c) December 10, 2001, the date Wong's Reply Memorandum on the motion to amend, which reiterated the request to amend, was filed. Adopting the first of these possible dates would create its own timeliness problem—whether the court claim was filed too early—under *McNeil*, 508 U.S. at 111-13; adopting the second might also raise a *McNeil* problem.[16]

Although there may be a defensible road through this thicket yielding the result that the FTCA claim was timely filed, at least constructively, *cf.* Fed. R. Civ. P. 15(c), reaching that result would entail one or more novel rulings concerning when FTCA claims added by amendment are considered filed. Moreover, and notably, any such ruling would in all likelihood itself rest on an equitable adjustment of the usual application of limitations periods, because some form of constructive filing date, different from the date the amended complaint was actually filed in the

---

[16] As noted, Wong's initial motion seeking leave to amend sought to treat the INS's inactivity regarding her claim as the agency's final decision under § 2675(a), but preceded the INS's denial of her claim on December 3, 2001. *See supra* part I.B.

district court, would be required. In the end, then, there is little difference in the underlying justification between applying traditional equitable tolling principles and devising a novel equitable solution to the filing date problem in this case. We therefore proceed along the established, traditional route.

In applying equitable tolling, courts "follow[] a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Holland*, 130 S. Ct. at 2563 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). Thus, the equitable tolling doctrine "enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id.* (internal quotation marks omitted) (alterations in original).

"[L]ong-settled equitable-tolling principles" instruct that "'[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.'" *Credit Suisse*, 132 S. Ct. at 1419 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (emphasis omitted)); *see also Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). As to the first element, "[t]he standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011). Central to the analysis is

whether the plaintiff was "without any fault" in pursuing his claim. *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

With regard to the second showing, "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Holland*, 130 S. Ct. at 2564 (internal quotation marks and citations omitted). Instead, a litigant must show that "extraordinary circumstances were the cause of his untimeliness and . . . ma[de] it impossible to file [the document] on time." *Ramirez*, 571 F.3d at 997 (internal quotation marks and citations omitted) (second alteration in original). Accordingly, "[e]quitable tolling is typically granted when litigants are unable to file timely [documents] as a result of external circumstances beyond their direct control." *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008).

Applying these longstanding principles in this case, we conclude that whatever may be the case regarding other bases for tolling, Wong's circumstances easily justify equitable tolling. As noted, Wong's claim was untimely because it was not filed within the six-month window running from December 3, 2001—the date on which the INS denied Wong's administrative claim—to June 3, 2002. That result was not the consequence of any fault or lack of due diligence on Wong's part. If anything, Wong took special care in exercising due diligence: Wong first sought leave to file her amended complaint "on or after November 20, 2001," which was, at the time that request was filed, the first day following exhaustion of her administrative remedies on which Wong would have been permitted to file her claim in the district court. And, even

after the INS denied her claim, thereby starting anew the six-month deadline under § 2401(b), *see Lehman*, 154 F.3d at 1014-15, Wong filed a Reply Memorandum reiterating her request to file an amended complaint including the FTCA claim. As the Magistrate Judge noted, it was "due solely to the delay inherent in the Magistrate Judge system" that no action was taken with respect to those requests until the six-month limitations period had already run. Moreover, by informing the parties and the court of her desire to file an FTCA claim well before the filing deadline and requesting leave to do so, Wong fulfilled the notice concern that partially underlies limitations statutes. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

We are not persuaded by the government's assertion that Wong was dilatory in seeking to file her claim because she did not expressly request a timely ruling from the district court. Nor are we persuaded that Wong should have filed an entirely new complaint alleging the FTCA claim rather than waiting for a ruling on the motion to amend. Wong was entitled to expect a timely ruling on her request to amend, which was made with a great deal of time to spare. And filing a new suit on the same facts as one pending would have been inefficient for all concerned —which is why amendments alleging new causes of action on the same factual allegations are permitted. *See* Fed. R. Civ. P. 15. Thus, Wong put forth the "effort that a reasonable person might be expected to deliver under . . . her particular circumstances." *Busby*, 661 F.3d at 1015.

In short, Wong's claim was rendered untimely because of external circumstances beyond her control. In light of these circumstances, we conclude that equitable tolling properly applies to excuse Wong's late-filed amended complaint, and that her FTCA claim against the United States therefore may proceed.

REVERSED and REMANDED.

Chief Judge KOZINSKI, concurring in the judgment:

I agree with Judges Tashima and Bea that 28 U.S.C. § 2401(b) is jurisdictional, but can't dissent because a plaintiff like Wong who begins her FTCA action too early can cure the defect by filing a motion to amend the premature complaint. *See Valadez-Lopez v. Chertoff*, 656 F.3d 851, 855-58 (9th Cir. 2011). Wong filed such a motion before she had finally exhausted her administrative remedies, which was too soon. *See* 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 112-13 (1993). But, on December 10, 2001, after the INS denied her claim and before the six-month section 2401(b) window slammed shut, Wong filed a reply memorandum reiterating her request for leave to file a second amended complaint.

While we don't typically treat a reply as a motion, there's nothing to preclude us from doing so. In this case, Wong's request had all the physical attributes of a motion: It was made in writing, filed with the court, served on the other side, prayed for relief and "state[d] with particularity" why she was entitled to it. *See* Fed. R. Civ. P. 7(b). She pointed out that "the court currently has jurisdiction over plaintiffs' FTCA claims and plaintiffs should be allowed to amend the complaint to add those claims." In her conclusion, she again prayed for this

relief: "[P]laintiffs should be granted leave to file their Second Amended Complaint."

The government concedes that if Wong moved for leave to amend her complaint during the six months following the INS's denial of her claim, she's entitled to maintain her lawsuit. *Cf. McNeil*, 508 U.S. at 107-10 & n.5; *Valadez-Lopez*, 656 F.3d at 855-58. Wong *did* file such a motion, albeit within a document captioned "Reply Memorandum."

The majority claims that construing Wong's reply as a motion would be "novel," maj. op. 43, but we regularly treat non-motion filings as motions when equity calls for it. *See, e.g., United States v. Rewald*, 835 F.2d 215, 216 (9th Cir. 1987) (construing notice of appeal as motion for remand); *United States v. Aguirre-Pineda*, 349 Fed. Appx. 212, 2009 WL 3368445, at *1 (9th Cir. 2009) (construing letter as motion for appointment of counsel); *Rapanan v. Nikkei Manor/Mikkei Concerns*, 42 Fed. Appx. 976, 2002 WL 1891677 (9th Cir. 2002) (construing letter as motion for extension of time to request oral argument). And there's certainly nothing novel about finding a motion nested within a document that serves another purpose. *See, e.g., United States v. Harvey*, 55 Fed. Appx. 445, 446 (9th Cir. 2003) (construing opening brief as motion to withdraw as counsel of record). Sometimes, we're even required to do so. *See, e.g.*, Ninth Circuit Rule 22-1(e) ("Uncertified issues raised and designated in [an appellant's opening brief] will be construed as a motion to expand the COA. . . . "). But even if it were novel, so what? Novelty is not an enemy of justice; we're judges, not plumbers.

We owe Wong the benefit of our compassion and creativity. After all, had the district court acted on her motion within the section 2401(b) six-month period, she wouldn't be in this fix. But the court took more than seven months to act on this routine motion—a delay Wong didn't cause and couldn't have foreseen. The government suggests that, instead of waiting for the district court to act on her motion, Wong should have refiled it. Yeah, right. How many litigants have the nerve to vex a federal judge with a clone motion while the original is still pending? Bad things can happen to those who twist the tiger's tail. *See, e.g., Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 439 (9th Cir. 1992) (affirming imposition of sanctions for filing duplicative motions). Instead, Wong used her reply sensibly: She reiterated her request to amend, advanced new arguments in support of that request and pointed out that the court had acquired jurisdiction to grant it. To treat Wong's document as a legal nullity because she called it a reply rather than a motion is inequitable and nonsensical. I thought we had abandoned such pedantry in 1938. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1196 (3d ed. 2004) ("Fortunately, under federal practice the technical name attached to a motion or pleading is not as important as its substance."); *see also* Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 Brook. L. Rev. 1, 2-3 (1988) ("When the Rules were first adopted, they were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through.").

The majority claims that construing Wong's reply as satisfying section 2401(b) would itself be "an equitable adjustment of the usual application of limitations periods." Maj. op. 43. If we're willing to do that, my colleagues argue, we should avoid this procedural "thicket" and just equitably toll the statute of limitations. *Id.* "In the end," the majority concludes, "there is little difference in the underlying justification between" its approach and mine. *Id.* But the FTCA's text, context and relevant historical treatment prohibit equitable tolling of the statutory deadline, not equitable construction of court filings. The majority and I may emerge on the same side—but I take the road our law provides. And that makes all the difference.

McNeil v. United States, 508 U.S. 106 (1993), confirms this. *McNeil* dealt with section 2675(a), a different timing provision of the FTCA, which bars instituting an action in federal court before the administrative claim is "finally denied by the agency." 508 U.S. at 111 (quoting 28 U.S.C. § 2675(a)). The Court held in no uncertain terms that this exhaustion requirement is jurisdictional. *McNeil*, 508 U.S. at 113; *see also* Bea Dissent at 90. But it also left open the possibility that a plaintiff who had filed a complaint prematurely might, after agency denial, file something else that "constitute[s] the commencement of a new action." *McNeil*, 508 U.S. at 110-11. The Court explained: "As the case comes to us, we assume that the Court of Appeals correctly held that nothing done by petitioner after the denial of his administrative claim on July 21, 1989, constituted the commencement of a new action." *Id.* at 110. The Court reiterated this later in the opinion: "Again, the question whether the Court of

Appeals should have liberally construed petitioner's letter [requesting counsel] as instituting a new action is not before us." *Id.* at 113 n.9. Thus, while finding a similar FTCA timing requirement to be jurisdictional, the Court made clear that the statute didn't impair our traditional power to liberally construe court filings—even mere letters—when equity calls for us to do so. If a letter asking for counsel can be "liberally construed . . . as instituting a new action," why not a reply? The Court saw no contradiction between construing the statute strictly and construing a pleading liberally. That's plenty good enough for me.

The federal judiciary caused Wong's problem, and in good conscience we should use such powers as we have to make it up to her. Had she filed nothing within the relevant time-frame, there would be nothing for us to construe and she'd be barred by the statute. *See* Bea Dissent; Tashima Dissent. But Wong *did* file, and that document contains a crystal clear motion to amend the complaint. We owe it to Wong to recognize this. I therefore concur in the judgment of the majority but in the reasoning of the dissents (as far as they go).

TASHIMA, Circuit Judge, joined by BEA, Circuit Judge, dissenting:

I join Judge Bea's dissenting opinion in full. I write separately to clarify the Federal Tort Claims Act's ("FTCA's") legislative history. This history, once understood in full context, dispels any doubt that the FTCA's limitations provision was intended to be jurisdictional.

I.

Two provisions of the FTCA are central for present purposes—the limitations provision, currently codified at 28 U.S.C. § 2401(b), and the jurisdiction-granting provision, currently codified at 28 U.S.C. § 1346(b). I begin with a brief history of these two provisions.

The FTCA was originally enacted in 1946 as Title IV of the Legislative Reorganization Act. *See* Pub. L. No. 79-601 ("1946 Act"), tit. IV, 60 Stat. 812, 842-47 (1946). Pursuant to the 1946 Act, the provisions of the FTCA were codified in Chapter 20 of Title 28. *See* 28 U.S.C. §§ 921-946 (1946). Among these provisions was the jurisdiction-granting provision, which read, in pertinent part:

> *Subject to the provisions of this chapter,* the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.

Id. § 931(a) (emphasis added). The FTCA thus conferred exclusive federal jurisdiction over tort actions against the United States, but "[s]ubject to the provisions of" Chapter 20. Included within Chapter 20 was the FTCA's limitations provision, then-codified at 28 U.S.C. § 942. *See id.* § 942. Accordingly, as originally enacted in the 1946 Act, the FTCA's grant of jurisdiction was "[s]ubject to" the limitations provision.

Congress recodified and reorganized Title 28 in 1948. *See* Pub. L. 80-773 ("1948 Act"), § 1, 62 Stat. 869 (1948). As part of the recodification, most of the provisions formerly grouped under Chapter 20 were regrouped under Chapter 171. *See id.* at 982-85. The limitations provision, however, was removed from this grouping and placed in its current location in Chapter 161, at 28 U.S.C. § 2401(b). *See id.* at 970-71. There, it was situated alongside 28 U.S.C. § 2401(a), which provides for a six-year statute of limitations in other types of civil actions against the United States. *See id.* at 971.

Also removed from the former Chapter 20 grouping was the jurisdiction-granting provision, which was recodified in Chapter 85, at 28 U.S.C. § 1346(b). *See id.* at 930, 933. Similarly to the limitations provision, this move consolidated the jurisdiction-granting provision with the other provisions of Title 28 granting jurisdiction in civil actions against the United States. *See id.* at 933. Because the reference to "this chapter" in the opening clause of § 1346(b) was now stale—given that § 1346(b) was no longer in the same chapter as the other FTCA provisions—the clause was changed to read, "Subject to the provisions of chapter 173 of this title." *Id.*

However, there was no Chapter 173 of Title 28. Rather, this was a scrivener's error that should have read Chapter 171. Throughout the drafting history of the 1948 Act, the chapter that would become Chapter 171—titled "Tort Claims Procedure"—had been designated Chapter 173, with the cross-reference in § 1346(b) corresponding to this designation. *See, e.g.*, H.R. 2055, 80th Cong., chs. 85, 173 (1947). When the chapter was renumbered to 171 via a late Senate amendment, *see* S. Rep. No. 80-1559, at 8 (1948), the drafters simply failed to update the cross-reference in § 1346(b). It is thus evident that, as of the 1948 Act, the opening clause of § 1346(b) should have read, "Subject to the provisions of chapter 171 of this title." Indeed, a year later, Congress amended § 1346(b) to correct this error and change the cross-reference to Chapter 171. *See* Pub. L. 81-55, 63 Stat. 62 (1949); *see also* S. Rep. No. 81-135, at 1-2 (1949).

II.

The history of the limitations and jurisdiction-granting provisions, as recounted above, taken in conjunction with the considerations discussed below, offer "a clear indication that Congress wanted the [limitations] rule to be jurisdictional." *Henderson ex. rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks omitted). First, and most importantly, it is plain that the limitations provision was jurisdictional as of the original 1946 Act, for the grant of jurisdiction was expressly "[s]ubject to"—that is, "contingent or conditional upon"—compliance with that provision. *See* Webster's New World Dictionary 1333 (3d Coll. ed. 1994); *see also* Webster's New International Dictionary 2509 (2d ed. 1940) (defining "subject to" as "[b]eing under the contingency of;

dependent upon or exposed to (some contingent action)"). It is difficult to imagine a more "clear statement" as to Congress' intent.[1] *See Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013).

If one accepts this proposition—which the majority only obliquely disputes[2]—then, in order to find § 2401(b) non-jurisdictional, one must conclude that Congress intended to strip the limitations provision of its jurisdictional status only two years later, through the 1948 Act. Under long-established Supreme Court precedent, however, we are not to "presume that the 1948 revision worked a

---

[1] Of course, this logic dictates that the requirements of Chapter 171 are also jurisdictional. At least two Circuit Courts have so held in accord with this reasoning. *See Mader v. United States*, 654 F.3d 794, 807 (8th Cir. 2011) (en banc) (relying on the "[s]ubject to" language of § 1346(b) in finding the presentment requirements of 28 U.S.C. § 2675(a) jurisdictional); *White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 457-58 (3d Cir. 2010) (relying on the same in finding the sum certain requirement of 28 U.S.C. § 2675(b) jurisdictional). *But see Parrott v. United States*, 536 F.3d 629, 634-35 (7th Cir. 2008) (holding that the statutory exceptions of 28 U.S.C. § 2680 are not jurisdictional, notwithstanding the language of § 1346(b)).

[2] In a footnote, the majority suggests that the phrase "'[s]ubject to' is more sensibly read to mean that litigants have to follow the prescribed procedures, not that each and every one of those procedures, if not followed, gives rise to the 'drastic' consequences that follow from lack of subject matter jurisdiction." Maj. Op. at 28 n.9. This interpretation not only ignores the ordinary meaning of "subject to," but it would render the opening clause of § 1346(b) surplusage. The very existence of the "prescribed procedures," as standalone statutory provisions, "means that litigants have to follow [them]." Thus, the "[s]ubject to" clause of § 1346(b) would have no substantive import under the majority's reading.

change in the underlying substantive law unless an intent to make such a change is clearly expressed." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (internal quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (citing cases applying this rule). Here, not only is such "clearly expressed" intent lacking, but there is an abundance of evidence to the contrary—that Congress had no desire to alter the jurisdictional status of the limitations provision.

In the Reviser's Notes to the 1948 Act,[3] Congress explained that § 2401 "consolidates" the FTCA's limitations provision with the six-year limitations period of 28 U.S.C. § 2401(a), which, like § 2401(b), had formerly been codified elsewhere in Title 28. *See* H.R. Rep. 80-308, at A185 (1947); *see also* 28 U.S.C. § 41(20) (1946) (former section of six-year limitations period). This purely organizational function—to consolidate the provisions of Title 28 setting forth limitations periods in actions against the government—is the obvious reason that Congress separated § 2401(b) from the other FTCA provisions and placed it in chapter 161.[4] If there were any doubt as to whether a substantive

---

[3] The Supreme Court has repeatedly relied on the Reviser's Notes in determining whether a substantive change was intended through the 1948 Act. *See, e.g., John R. Sand & Gravel*, 552 U.S. at 136; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989).

[4] The same purpose was carried out with respect to the jurisdiction-granting provision, which was consolidated in § 1346 with the other provisions of Title 28 granting jurisdiction in civil actions against the government. *See* 1948 Act, § 1, 62 Stat. at 933; *see also* William W. Barron, *The Judicial Code: 1948 Revision*,

purpose was intended, the Reviser's Notes then added, "Subsection (b) of the revised section [2401] simplifies and restates [former 28 U.S.C. § 942], *without change of substance.*" H.R. Rep. 80-308, at A185 (emphasis added).

Congress provided equally definitive guidance in the actual text of the 1948 Act. In an uncodified provision, Congress instructed, "*No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any [] section is placed.*" 1948 Act, § 33, 62 Stat. at 991 (emphasis added). Of course, precisely such an inference is required to find § 2401(b) non-jurisdictional, because one must assume that Congress intended to alter the jurisdictional status of the limitations provision by removing it from the FTCA Chapter and placing it in Chapter 161.

In short, there is no indication—let alone a "clearly expressed" indication—that Congress intended to alter the jurisdictional status of the limitations provision through the 1948 Act.

III.

The majority offers several responses to this historical evidence, none of which is persuasive. First, the majority contends that "it is improper to consider legislative history" because the statutory text is "plain." Maj. Op. at 24. It is a curious statute that is unambiguous but manages to

---

8 F.R.D. 439, 445 (1949) ("The statutes conferring jurisdiction . are consolidated into a single section. The revised section consolidates and clarifies three widely separated provisions of the former code.").

produce an intracircuit split, several en banc dissents, and dozens of pages of analysis by the majority to justify its conclusion. These considerations aside, the fact is that the goal of the jurisdictional inquiry is "to ascertain Congress' intent." *Henderson*, 131 S. Ct. at 1204. The majority recognizes that we must look to factors such as "context" and "relevant historical treatment" to discern this intent, Maj. Op. at 11 (quoting *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1246 (2010)), but it provides no reason why legislative history may not similarly be considered.[5] The majority, in effect, invokes the requirement that there be evidence of clear congressional intent, and it then seeks to shut the door on the very evidence that could support this showing.

Perhaps recognizing that its "plain text" argument sits on shaky ground, next, the majority implicitly acknowledges that the limitations provision was jurisdictional under the original 1946 Act, but it contends that the 1948 revision undid this status. Maj. Op. at 25-28. In this regard, the majority does at least make a passing reference to the rule that we are not to presume the 1948 Act effected substantive change unless "clearly expressed." Maj. Op. at 27. According to the majority, though, such clear expression can be found in Congress' amending the

---

[5] As described below, the legislative history is particularly probative of congressional intent in the instant case given that the focus is on the statutory scheme as enacted by Congress, and given that this enactment occurred only two years prior to the adoption of the current statutory language.

cross-reference in § 1346(b) to Chapter 171, which did not include the limitations provision. Maj. Op. at 27.

This argument quickly falls apart upon considering the history of the two key provisions. As explained, the removal of the limitations provision from the FTCA Chapter was solely for organizational purposes, to consolidate the provisions of Title 28 setting forth limitations periods in actions against the government. Likewise, the redesignation of the cross-reference in § 1346(b), to Chapter 171, was merely an artifact of reorganization. The jurisdiction-granting provision previously referenced "this chapter"—referring to the FTCA Chapter of Title 28—but this reference became outdated once the jurisdiction-granting provision was stripped out of the FTCA Chapter. Congress simply updated the cross-reference, inserting the new number of the FTCA Chapter, Chapter 171. In the end, therefore, the majority's argument is entirely circular. The majority relies on the reorganization, and nothing else, as a clear expression that the reorganization effected substantive change.[6]

---

[6] The majority contends that, under my treatment of the legislative history, the limitations period would remain jurisdictional regardless of "what Congress wrote into the FTCA's jurisdictional grant in 1948." Maj. Op. at 27. Hardly the case. If Congress truly intended to alter the provision's jurisdictional status, it could have provided an affirmative statement to this effect in the text of the 1948 Act, in the Reviser's Notes, or elsewhere in the legislative history. *See* Barron, *supra*, at 446 ("Congress . . . includ[ed] in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor."). The requirement that Congress affirmatively express

Finally, the majority falls back on the notion that the FTCA's "drafting history" cannot supply a clear statement of Congress' intent. Maj. Op. at 27-28. The 1946 Act, however, does not reflect "drafting history." It is the statutory scheme as enacted by Congress. And it is the scheme put into place only two years prior to the revisions that produced the current statutory language, revisions that we are to presume did not effect any substantive change. Under these circumstances, it is entirely reasonable to rely on the 1946 Act as providing a "clear indication" of Congress' intent. *Henderson*, 131 S. Ct. at 1205.

IV.

Given the legislative history recited above, I have little difficulty concluding that the FTCA's limitations provision was intended to be jurisdictional. Congress provided a clear statement to this effect when enacting the provision in 1946. When reorganizing Title 28 only two years later, Congress did not "clearly express[]," or provide any indication at all, that it intended to disturb this status. For these reasons, as well as the reasons outlined in Judge Bea's dissenting opinion, I respectfully dissent.

---

such an intent is not one I have created, but one that is mandated as a matter of Supreme Court doctrine. *See Keene Corp.*, 508 U.S. at 209.

BEA, Circuit Judge, with whom TASHIMA, Circuit Judge, joins, dissenting:

The majority opinion permits courts, for equitable reasons, to extend the time in which a tort action can be begun against the Government, after the obligatory administrative claim has been filed and denied. Because I believe Congress clearly expressed its intent that 28 U.S.C. § 2401(b) would limit the jurisdiction of federal courts by providing that tort claims "shall be forever barred" unless action is begun within the six-month period following denial of the administrative claim by the concerned agency, with no exceptions, I respectfully dissent.

I. The "Jurisdictional" vs. "Claim-Processing" Distinction and Our Inquiry

The majority is correct, of course, in noting that the Supreme Court has created a rebuttable presumption that equitable tolling applies to suits against the United States. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).[1] But that presumption is not universally applica-

---

[1] In *Irwin*, the petitioner was fired from his job by the Veterans' Administration ("VA"). *See id.* at 90. He filed a complaint with the VA, alleging that it had unlawfully discharged him on the basis of race and physical disability. *See id.* at 91. The VA dismissed the complaint, and the Equal Employment Opportunity Commission ("EEOC") affirmed that decision. *See id.* The petitioner had the right to file a civil action in district court but was required to do so within 30 days of the EEOC's affirmance. *See id.* (citing 42 U.S.C. § 2000e-16(c)). The petitioner filed a complaint in district court 44 days after his attorney's office received the EEOC's notice, which was only 29 days after the date on which he claimed to have received

ble. As the majority admits, it has no application to certain kinds of "more absolute" statutes of limitations. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008).[2] These "more absolute" statutes "seek not

---

the notice. *See id.* The district court held that the limitations period began when the attorney's office received the notice and granted the VA's motion to dismiss for lack of jurisdiction. *See id.* The Fifth Circuit affirmed and held that compliance with § 2000e-16(c)'s time limit was a jurisdictional requirement. *See id.* The Supreme Court held that § 2000e-16(c)'s time limit was not jurisdictional; instead, the Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. Because the principles of equitable tolling did "not extend to what is at best a garden variety claim of excusable neglect," however, the Court affirmed the dismissal. *See id.* at 96.

[2] In *John R. Sand & Gravel*, the petitioner filed an action in the Court of Federal Claims, asserting that various Environmental Protection Agency activities on land it leased for mining purposes amounted to an unconstitutional taking of its leasehold rights. *See id.* at 132. The Government initially asserted that the claims were untimely under 28 U.S.C. § 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." *See id.* (quoting 28 U.S.C. § 2501). The Government later conceded that certain claims were timely, and subsequently won on the merits. *See id.* On appeal, the Court of Appeals for the Federal Circuit held that the action was untimely filed and should have been dismissed for that reason. *See id.* at 133. The Supreme Court affirmed and held that compliance with § 2501's time limit is a jurisdictional requirement. *See id.* at 138-39. As noted below, the Court also explained the difference between jurisdictional statutes of limitations and those to which *Irwin*'s presumption can be applied. *See id.* at 133-34.

so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *Id.* at 133. The Court has described the time limits in such statutes of limitations as "jurisdictional." *See id.* at 134.

The majority believes the distinction between these "more absolute" or "jurisdictional" statutes, to which courts cannot create exceptions based on equitable considerations, and mere "claim-processing rules," to which *Irwin*'s rebuttable presumption applies, is "critical for present purposes." *See* Op. at 8-9. The majority calls § 2401(b) a "quintessential claim-processing rule," *see* Op. at 1039, but calling something a name does not change its nature.[3] And the critical question is not whether *we* characterize § 2401(b) as a "quintessential claim-processing rule," *see* Op. at 18, but whether *Congress* mandated that its prescribed time limit be jurisdictional, *see Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (noting that "Congress is free to attach the conditions that go with the jurisdictional label to a rule that [courts] would prefer to call a claim-processing rule.").[4] To make this

---

[3] The majority ignores the simple truth contained in the aphorism ascribed, perhaps apocryphally, to Abraham Lincoln: "If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't make it a leg."

[4] In *Henderson*, the petitioner, a veteran of the Korean War who had been given a 100-percent disability rating for paranoid schizophrenia, filed a claim with the Department of Veterans Affairs ("VA") for supplemental benefits based on his need for in-home care.

determination, the court must "look to see if there is any clear indication that Congress wanted the rule to be jurisdictional." *Id.* (internal quotation marks and citation omitted). And, to find such a "clear indication," we must examine the statute's "text, context and relevant historical treatment." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010).[5]

See id. at 1201. The VA regional office and Board of Veterans' Appeals denied the petitioner's claim. *See id.* The petitioner filed a notice of appeal with the Veterans Court, but he missed the 120-day filing deadline by 15 days. *See id.* (citing 38 U.S.C. § 7266(a)). The Veterans Court dismissed the appeal for lack of jurisdiction, treating compliance with the 120-day deadline as a jurisdictional requirement. *See id.* at 1202. The Federal Circuit affirmed. *See id.* Because § 7266(a) "provide[d] no clear indication that Congress wanted the provision to be treated as having jurisdictional attributes," the Supreme Court reversed and held that the 120-day limitation period was not jurisdictional. *Id.* at 1205-06.

[5] In *Reed Elsevier*, authors, some of whom had registered copyrights for their works and others who had not, sued publishers and electronic databases for copyright infringement. *See id.* at 158. The parties settled and filed a motion in federal district court to certify a class for settlement and approve the settlement agreement. *See id.* at 159. Ten freelance authors ("the Muchnick respondents") objected. *See id.* The district court overruled those objections, certified a settlement class of freelance authors, approved the settlement, and entered final judgment. *See id.* The Muchnick respondents appealed, and the Second Circuit held that the district court lacked jurisdiction to certify a class of claims arising from the infringement of unregistered works. *See id.* at 159-60 (citing 17 U.S.C. § 411(a), which provides, in relevant part, that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made"). The Supreme Court reversed and held that

II. The Statute's Text

Section 2401(b) provides, in relevant part, that "[a] tort claim against the United States shall be forever barred unless . . . action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

A. Reading § 2401(b) with § 2675.

Perhaps where the majority goes wrong is in considering § 2401(b) as a stand-alone statute of limitations, rather than considering it in conjunction with the complementary administrative exhaustion requirement of 28 U.S.C. § 2675. The Court has instructed against such a restrictive view of statutory conditions for bringing suit. *See United States v. Dalm*, 494 U.S. 596, 601 (1990).[6] Instead, courts should

---

§ 411(a) imposed a nonjurisdictional precondition to suit. *See id.* at 166.

[6] In *Dalm*, the respondent had been appointed administratrix of her employer's estate. *See id.* at 598. In return for her services, she received fees from the estate and two payments from the employer's surviving brother. *See id.* at 599. The respondent reported the latter payments as gifts and paid the appropriate gift tax. *See id.* The Internal Revenue Service ("IRS") audited the respondent's income tax returns and determined that the payments should have been reported as income. *See id.* The respondent petitioned the Tax Court for a redetermination but subsequently settled the case. *See id.* After she agreed to the settlement, the respondent immediately filed an administrative claim for return of the gift tax she had paid. *See id.* When the IRS failed to act on her claim within six months, she filed suit in district court, seeking a refund of "overpaid gift tax." *Id.* at 600. The district court granted the Gov-

read together "provisions which qualify an [individual]'s right to bring . . . suit upon compliance with certain conditions." *Id.*[7] Here, two statutory provisions qualify an individual's right to file suit for tort against the United States. *See* 28 U.S.C. § 2675(a); 28 U.S.C. § 2401(b).

---

ernment's motion to dismiss the suit for lack of jurisdiction, because the respondent's suit was untimely under the applicable statute of limitations: 26 U.S.C. § 6511(a). *See id.* The Sixth Circuit reversed and held that the doctrine of equitable recoupment should be applied to permit the respondent's suit to proceed. *See id.* The Supreme Court reversed and held that the district court did not have jurisdiction to entertain the untimely action. *See id.* at 610.

[7] In *Dalm*, there were two such provisions. See *id.* at 601-02 (stating that 26 U.S.C. § 7422, which provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary," and 26 U.S.C. § 6511(a), which provides that, if a taxpayer is required to file a return with respect to a tax, the "[c]laim for refund or credit . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later," were both relevant qualifications on a taxpayer's right to bring a refund suit). Because both provisions established conditions on a taxpayer's right to bring suit, the Court read them together. *See id.* at 602 ("Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund . . . may not be maintained in any court." (citations omitted)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

First, § 2675 provides that "[a]n action shall not be instituted upon a claim against the United States for money damages . . . , unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). This section requires that an administrative claim be made to the responsible agency, and it disallows suit until the denial of such claim is final. *See id.* No such administrative claims filing is needed to commence an action against a private person under applicable state law. *Irwin*, 498 U.S. at 96 (reasoning that principles "applicable to suits against private defendants should also apply to suits against the United States").

Section 2401(b) is § 2675(a)'s logical complement. It provides that:

> [a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). This provision establishes the time limits applicable to presenting an administrative claim and beginning a civil action. As in *Dalm*, the import of these two sections is clear when they are read together: Unless an administrative claim is presented to the responsible agency before action is begun, and unless both the claim and the action are begun within the time limits im-

posed by § 2401(b), the tort claim against the United States "shall be forever barred."

B. Section 2401(b) Refers to Courts' Jurisdiction.

The majority holds, in a rather conclusory fashion, that § 2401(b) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the federal courts." Op. at 15 (internal quotations and citations omitted). I disagree. While it is true that § 2401(b) does not mention the term "jurisdiction," the same is true of several statutes of limitations the Court has found to be jurisdictional. *See John R. Sand & Gravel*, 552 U.S. at 134 (holding 28 U.S.C. § 2501 jurisdictional, despite the absence of the term "jurisdiction"); *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (same with respect to 28 U.S.C. § 2107(a) and (c))[8]; *Dalm*,

---

[8] In *Bowles*, an Ohio jury convicted the petitioner of murder and sentenced him to 15-years-to-life imprisonment. *See id.* at 207. The petitioner unsuccessfully challenged his conviction and sentence on direct appeal, and then filed a federal habeas corpus petition. *See id.* The district court denied habeas relief. *See id.* After the entry of final judgment, the petitioner had 30 days to file a notice of appeal. *See id.* (citing 28 U.S.C. § 2107(a)). He failed to do so. *See id.* Instead, he later filed a motion to reopen the period in which to file a notice of appeal under 28 U.S.C. § 2107(c), which allows district courts to extend the filing period for 14 days. *See id.* The district court granted the motion to reopen, but "inexplicably gave [the petitioner] 17 days," instead of the 14 days permitted by statute. *See id.* The petitioner filed his notice of appeal after the 14-day period allowed by statute but within the 17 days allowed by the district court. *See id.* The Sixth Circuit held that it lacked jurisdiction to entertain the appeal, because the notice of appeal was untimely filed. *See id.* The Supreme Court affirmed and held that

494 U.S. at 609 (same with respect to 26 U.S.C. § 7422(a) and 26 U.S.C. § 6511(a)).[9] The majority fails to appreciate a crucial difference between the statutes of limitations the Court has deemed jurisdictional and those to which the Court has applied equitable tolling: whether the statute expressly mandates a consequence for the failure timely to file.

1. Plain Statutes of Limitations: No Consequences Mandated for Failure Timely to File

Some statutes of limitations require that certain actions be performed within a specified period of time without specifying consequences to be applied where the actions are not performed as prescribed. *See, e.g.*, 17 U.S.C. § 411(a) ("[Subject to certain exceptions], no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."); 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."); 38 U.S.C. § 7266(a) ("In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall

---

"the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 214.

[9] Unfortunately, the Court has not yet analyzed whether § 2401(b) is or is not jurisdictional. We must therefore use what tools the Court has given us in its discussions of similar statutory provisions and reason by analogy.

file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed. . . . "); F. R. Bankr. P. 4004(a) ("[A] complaint . . . objecting to the debtor's discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)."). These statutes, as evidenced by the quotations above, are often written in mandatory terms. Significantly, while they make *parties'* actions mandatory, they do not contain mandatory *consequences* for noncompliance.

The Court has instructed that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003).[10] It

---

[10] In *Barnhart*, the Court addressed 26 U.S.C. § 9706(a)'s requirement that the Commissioner of Social Security assign, before October 1, 1993, each coal industry retiree eligible for benefits to an operating company or related entity, which would then be responsible for funding the assigned beneficiary's benefits. *See id.* at 152-53. The Commissioner did not complete all the assignments by the statutory date, and several coal companies challenged the Commissioner's by then tardy assignments. *See id.* at 156. The companies obtained summary judgments in each case, and the Sixth Circuit affirmed. *See id.* at 157. The Supreme Court held that it was "unrealistic to think that Congress understood unassigned status as an enduring 'consequence' of uncompleted work, for nothing indicates that Congress even foresaw that some beneficiaries matchable with operators still in business might not be assigned before October 1, 1993." *Id.* at 164-65. Thus, it read the statutory deadline as "a spur to prompt action, not as a bar to tardy completion of the business of ensuring

makes good sense, then, that the Court has regularly held that statutes of limitations lacking provisions specifying consequences do not speak in jurisdictional terms or refer to the courts' jurisdiction. *See, e.g., Henderson*, 131 S. Ct. at 1204 (holding that the terms of 38 U.S.C. § 7266(a) "do not suggest, let alone provide clear evidence, that the provision was meant to carry jurisdictional consequences"); *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (holding that 28 U.S.C. § 2244(d)(1) "does not set forth an inflexible rule requiring dismissal whenever its clock has run" (internal quotation marks and citations omitted))[11]; *Reed Elsevier*, 559 U.S. at 165 (holding that 17

---

that benefits are funded . . . by those identified by Congress as principally responsible." *Id.* at 172.

[11] In *Holland*, the petitioner was convicted of first-degree murder and sentenced to death. *See id.* at 2555. The Florida Supreme Court affirmed that judgment, and, on October 1, 2001, the Supreme Court denied the petition for certiorari. *See id.* On that date, 28 U.S.C. § 2244(d)'s one-year statute of limitations for filing a habeas petition began to run. *See id.* On September 19, 2002 (i.e. 12 days before the one-year limitations period expired), a state-appointed attorney filed a motion for post-conviction relief in the state court, which automatically stopped the running of the limitations period. *See id.* In May 2003, the state trial court denied relief. *See id.* By February 2005, when the Florida Supreme Court heard oral argument in the case, the petitioner and his appointed attorney rarely communicated. *See id.* Indeed, the petitioner asked the Florida Supreme Court to remove the attorney from his case because of a "complete breakdown in communication," including a failure to keep him informed of the case's status. *See id.* The Florida Supreme Court denied the petitioner's request. *See id.* at 2556. The petitioner subsequently wrote the attorney several times and emphasized the importance of filing a timely petition for habeas

U.S.C. § 411(a) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" (citation omitted)); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (holding that "the filing deadline[] prescribed in Bankruptcy Rule[] 4004 . . . do[es] not delineate what cases bankruptcy courts are competent to adjudicate").[12] These cases stand for the general proposition

---

corpus in federal court once the Florida Supreme Court ruled against him. *See id.* In November 2005, the Florida Supreme Court affirmed the denial of post-conviction relief. *See id.* On December 1, 2005, it issued its mandate, and the federal habeas clock began again to tick. *See id.* Twelve days later, the one-year limitations period expired, with the petitioner never having been informed that the Florida Supreme Court had made a ruling. *See id.* at 2556-57. When the petitioner learned of the adverse ruling on January 18, 2006, he immediately wrote a pro se habeas petition and mailed it to the district court. *See id.* at 2557. The district court held that equitable tolling was unwarranted because the petitioner did not seek help from the court system to determine when the mandate issued. *See id.* The Eleventh Circuit affirmed and held that the attorney's negligence could never constitute an "extraordinary circumstance" sufficient to toll the limitations period. *See id.* The Supreme Court rejected the district court's erroneous determination that the petitioner had not been diligent and the Eleventh Circuit's rigid, categorical approach. *See id.* at 2565. It then held that § 2244(d)'s time limit was subject to equitable tolling and remanded for further proceedings. *See id.* at 2565.

[12] In *Kontrick*, a creditor objected to a debtor's discharge in a liquidation proceeding. *See id.* at 446. The applicable rule provided that such an objection had to be made within "60 days after the first date set for the meeting of creditors." *Id.* (quoting Fed. R. Bkrtcy. P. 4004(a)). The creditor's objection was untimely under this rule. *See id.* The debtor did not file a motion to dismiss the objection as untimely, however, until after the Bankruptcy Court

identified above: If the statutory text does not mandate dismissal as the consequence for noncompliance, the courts should not read the statute as having jurisdictional consequences (i.e. mandatory dismissal without exception). Instead, per *Irwin*'s instruction, the courts should presume equitable tolling may be applied to the statute in question, and then proceed to determine whether that presumption has been rebutted and, if not, whether the running of the timing provision should be tolled for equitable reasons. *See Irwin*, 498 U.S. at 95-97.[13]

2. Consequence Statutes of Limitations: Mandatory Consequences for a Failure Timely to File

In contrast, however, are statutes of limitations that specify the consequences of a party's failure to adhere to a prescribed time limit. *See, e.g.*, 26 U.S.C. § 7422(a) ("No

---

decided that the discharge should be refused. *See id.* The Bankruptcy Court held that the time limit was not jurisdictional, and the Seventh Circuit affirmed. *See id.* at 447. The Supreme Court affirmed and held that Rule 4004(a) was not jurisdictional, so that "a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge." *Id.*

[13] Of course, if the court finds that the presumption has been rebutted or that no equitable considerations justify tolling the statute, it should dismiss the complaint for failure to comply with the statute of limitations. The key consideration here is that, when a statute does not specify mandatory consequences for failure timely to act, the court is permitted to rely on *Irwin*'s presumption that equitable tolling applies. Nothing in the text of that statute suggests that the presumption should not apply.

suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed with the Secretary. . . . "); 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."); 28 U.S.C. § 2107(a) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."); 28 U.S.C. § 2409a(g) ("Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued."). Like the first category of statutes discussed *supra*, these statutes speak in mandatory terms. They do not, however, merely require that parties take actions at specified times. Instead, these statutes require the courts to respond in a certain way to a party's failure to timely act by making the *consequences* of noncompliance, rather than just the acts, mandatory.

It is clear, then, that there are two different kinds of mandatory provisions: (1) those that make certain actions mandatory on the parties but do not specify the consequences of noncompliance, and (2) those that also provide mandatory consequences for failures to act according to their prescriptions. The Court has mentioned the importance of this distinction in the past. *See Henderson*, 131 S. Ct. at 1204 (holding a statute nonjurisdictional in part because its language did "not suggest, let alone

provide clear evidence, that the provision was meant to carry jurisdictional consequences"); *Holland*, 130 S. Ct. at 2560 (noting that the nonjurisdictional statute did "not set forth an inflexible rule requiring dismissal whenever its clock has run" (internal quotation marks and citations omitted)). I agree with the majority that not all mandatory prescriptions are properly categorized as jurisdictional. *See* Op. at 18. But I also believe that, to determine which mandatory prescriptions are jurisdictional, we must pay close attention to precisely *what* Congress has made mandatory (i.e. a party's action or the consequences for a party's failure timely to act). Thus, when Congress has mandated that a particular consequence will accompany a party's noncompliance with statutory timing provisions, courts are not free to impose other consequences or, as the majority does in this case, to fail to impose any consequence at all.

The reason is simple: When Congress mandates that a particular *consequence* be imposed, it limits the court's power to act. When the consequence is that the claim "shall be barred" or the case "shall not be maintained," Congress has spoken in jurisdictional terms.[14] *Cf. John*

---

[14] I acknowledge that such a holding may conflict with *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), but, for reasons discussed *infra* at 79-83, I believe that case is inconsistent with subsequent Supreme Court cases and is no longer good law.

Further, by giving examples of when Congress has spoken in jurisdictional terms I am not relying on "magic words" that must be included. Op. at 19. These phrases are merely examples of terms

R. Sand & Gravel, 552 U.S. at 134 (holding that 28 U.S.C. § 2501, which includes "shall be barred" language, is jurisdictional); *Dalm*, 494 U.S. at 609 (holding that 26 U.S.C. § 6511(a), which, when read with 26 U.S.C. § 7422(a), includes "may not be maintained" language, is jurisdictional). The majority holds that *John R. Sand & Gravel* and *Bowles* "did not hold [the statutes at issue] jurisdictional based on the consequential language of the statute" but because of "a century's worth of precedent and practice in American courts." Op. at 19, n.3. But what was that "century's worth of precedent" based on? The Court's ancient recognition that some statutes of limitations have *consequences*. *Kendall v. United States*, 107 U.S. 123, 125 (1883) (statute of limitation "forever barred" "*every claim*"); *Finn v. United States*, 123 U.S. 227, 332 (1887) (holding that the express words of the act of 1863—stating claims were "forever barred"—was a condition to the right to a judgment against the United States and the court *must* dismiss the petition if the condition was not satisfied). Such consequences speak to "the courts' statutory . . . power to adjudicate the case." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). To illustrate this point, one asks: What statutory power does a court have to adjudicate a claim which, according to congressional mandate, "shall be barred" or "shall not be maintained?" The answer is simple: None.[15] It seems natural, then, to conclude that when a

---

which mandate that a particular consequence must be imposed, and that *consequence* is what makes the statute jurisdictional.

[15] This fact separates the two kinds of statutes of limitations. When a statute does not specify a mandatory consequence, the oper-

statute includes such language, it speaks in jurisdictional terms. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes speak to the power of the court rather than to the rights of obligations of the parties." (citation omitted)).[16]

---

ation of *Irwin*'s presumption makes sense (i.e. courts can generally assume Congress intended equitable tolling to apply unless something suggests otherwise). When Congress specifies a mandatory consequence, however, courts should assume Congress meant what it said (i.e. that the consequence is mandatory and applicable in every case).

[16] Unfortunately, while the Court has stated, on several occasions, that a particular statute does not speak in jurisdictional terms, *see ante* at 68, it has not clarified exactly when a statute does speak in jurisdictional terms. Still, the Court has held that the statutes in the second category above are jurisdictional. *See John R. Sand & Gravel*, 552 U.S. at 134 (holding that 28 U.S.C. § 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition is filed within six years after such claim first accrued," is jurisdictional); *Bowles*, 551 U.S. at 213 (holding that 28 U.S.C. § 2107(a) and (c), which provide that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment, order or decree," except that a court may "extend the time for appeal upon a showing of excusable neglect or good cause," is jurisdictional); *Dalm*, 494 U.S. at 609 (holding that 26 U.S.C. § 6511(a), which, when read with 26 U.S.C. § 7422(a), provides that "unless a claim for refund of a tax has been filed within the time limits . . . , a suit for refund . . . may not be maintained in any court," is jurisdictional). It has also mentioned the kind of language that would speak in jurisdictional terms. *See Henderson*, 131 S. Ct. at 1204 (implying that jurisdictional language would include a suggestion "that the provision was meant to carry

Section 2401(b) falls into the second category identified above. It does not merely specify what a party must do; it specifies the consequences of a failure to act according to its time limit. If action is not begun within six months after the agency mailed its final denial of the claim, such claim "shall be forever barred." *See* 28 U.S.C. § 2401(b). Because the court has no statutory power to adjudicate such a claim, I would hold that, unlike the statute considered in *Holland*, § 2401(b) "set[s] forth an inflexible rule requiring dismissal whenever its clock has run." *Holland*, 130 S. Ct. at 2560. In that manner, and unlike the statute considered in *Henderson*, the language of § 2401(b) "provide[s] clear evidence[] that the provision was meant to carry jurisdictional consequences." *Henderson*, 131 S. Ct. at 1204. Thus, its pronouncement "speak[s] in jurisdictional terms" or, at the very least, "refer[s] in any way to the jurisdiction of the district courts." *Reed Elsevier*, 559 U.S. at 165.[17]

---

jurisdictional consequences"); *Holland*, 130 S. Ct. at 2560 (implying that a statute would speak in jurisdictional language if it "set forth an inflexible rule requiring dismissal whenever its clock has run" (internal quotation marks and citations omitted)). In any event, as the majority acknowledges, the Court has instructed that Congress "need not incant magic words . . . to speak clearly." Op. at 11 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013)). Thus, Congress need not explicitly state that a time limit is jurisdictional; it is free to specify consequences that relate to a court's power to adjudicate cases and trust that the court will understand what those consequences mean.

[17] While a statute that specifies mandatory consequences is jurisdictional, the reverse is not necessarily true. *See, e.g.*, *McNeil*, 508 U.S. at 111-12 (holding 28 U.S.C. § 2675, which does not specify

The majority calls my delineation of statutes of limitations a "grand theory". Op. at 18. I appreciate their praise, but I humbly submit there is nothing "grand" about following the "clear evidence" provided by Congress and the Supreme Court.

C. The Importance of the Term "Forever."

The majority escapes this rather straightforward conclusion with the assertion that "§ 2401(b) merely states what is always true of statutory filing deadlines: once the limitations period ends, whether extended by the application of tolling principles or not, a plaintiff is 'forever barred' from presenting his claim to the relevant adjudicatory body." Op. at 1038 (citing *Kubrick*, 444 U.S. at 117).[18] The majority has simply written the term "forev-

---

mandatory consequences for noncompliance, jurisdictional). This dissent does not imply that the specification of mandatory consequences is the *only* way for Congress to express its intent that a statute be jurisdictional. Congress may express its intent that a statute be jurisdictional in other ways (i.e. it need not incant magic words), and, indeed, a statute may be jurisdictional for reasons other than the text. *See Reed Elsevier*, 559 U.S. at 166 (2010) (instructing courts, in determining whether a statute is jurisdictional, to look to the statute's "text, *context and relevant historical treatment*" (emphasis added)).

[18] I must confess that I have struggled to find which portion of the Court's opinion in *Kubrick* supports the majority's position about what is "ordinarily true of statutory filing deadlines." Op. at 15. Surely it is not this portion: "Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. And

er" out of the statute, ascribing it no meaning nor importance at all. It is a mere "vestige of mid-twentieth-century congressional drafting conventions,"[19] Op. at 18, and adds nothing that the statute would not say without it, because all statutes of limitations, if applicable, bar claims "forever," *see* Op. at 15-17.

But the majority fails to consider the standard canon of statutory construction that requires courts to give meaning, if possible, to *each* of a statute's terms. *See Lowe v. SEC.*, 472 U.S. 181, 208 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (explaining that "[t]he surplusage canon holds that it is no more the court's function to revise by subtraction than by addition."). To the majority, the term "forever" is tautological; it has no meaning whatsoever. But that is not the view of well-established dictionaries at the time the statute was drafted. *See, e.g.*, Webster's New International Dictionary 990 (2d ed. 1943) (defining the adverb "forever" as "1. For a limitless time or endless ages; everlastingly; eternally," and "2. At all times; always; incessantly,"

---

surely it is not this portion: "We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Id.* at 117-18. I simply see no support for the majority's position in *Kubrick*.

[19] The majority's deprecatory labelling is off by about 100 years. In *Kendall v. U.S.*, 107 U.S. at 124, the term "forever barred" in the act of March 3, 1863, was definitively interpreted.

and identifying "invariably" and "unchangeably" as synonyms).

Usage of the term "forever," as in "forever barred," connotes something that obtains under any and all circumstances, something that is invariably so. But this is nothing new. In *Kendall v. United States*, the Supreme Court interpreted a statute of limitations which included the phrase "forever barred" and stated: "What claims are thus barred? The express words of the statute leave no room for contention. *Every claim*—except those specially enumerated—is forever barred unless asserted within six years from the time it first accrued." 107 U.S. at 125 (emphasis added). Forever, as in "forever barred", has an inclusionary meaning—"every claim"—as well as a temporal meaning—for all time. *Kendall* has continued to be cited approvingly in *Soriano v. United States*, 352 U.S. at 273,[20] and *John R. Sand & Gravel*, 552 U.S. at 134, on the way to holding statutes of limitations "jurisdictional."

As used in § 2401(b), then, the term "forever" means that an FTCA claim is invariably barred unless a civil action is commenced within the six-month period following final denial of the administrative claim. Moreover, according to the majority's theory, the fact that Congress included "forever barred" language in "various other statutes enacted in the mid-twentieth century," *see* Op. at 17, must mean that Congress merely plugged boilerplate

---

[20] *John R. Sand & Gravel* held that *Soriano* is still good law. 552 U.S. at 137.

language into these provisions, without thinking or assigning any special meaning to the words it chose to employ. But the fact that Congress included the term in *various* limitations periods, and not *all* limitations periods, suggests the exact opposite is true: On the occasions when Congress used the term "forever barred," it did so intentionally and for a reason. It is especially telling that Congress did not adhere to the majority's claimed "drafting convention" when, in 1948, it drafted § 2401(a), the very section that precedes the one here in issue. *See* Act of June 25, 1948, chap. 646, 62 Stat. 971 (June 25, 1948) ("Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (citations omitted)).

The majority finally holds that *if* "forever" does mean anything, it merely focuses on time and emphasizes that "once barred, [a FTCA claim] is precluded permanently, not temporarily or until some later event occurs" and that "the word 'forever' cannot bear [the] weight" that I give it. Op. at 21, n.4. However, our canons of construction cannot bear the *lack* of weight the majority gives it, see *Lowe*, 472 U.S. 181 at n.53, and neither can our history. *See Kendall*, 107 U.S. at 125.

I do not subscribe to the facile construct that we can read "forever barred" to mean nothing more than "barred." Nor do I believe "forever" is a non-cipher.

"We are not free to rewrite the statutory text." *McNeil*, 508 U.S. at 111. By providing that claims not presented within the time prescribed "shall be forever barred," Congress clearly expressed its intention that "every claim" (*Kendall*, 107 U.S. at 125) would be *invariably* barred, not *sometimes* barred so that equitable considerations might be held to extend the time in which to begin actions on such claims.

D. Ninth Circuit Precedent

The majority relies on three of this court's previous opinions to support its conclusion that § 2401(b)'s "shall be forever barred" language does not mean that the statute's time limit is jurisdictional.[21] *See* Op. at 16-17. It first

---

[21] The majority also cites out of circuit authority—*Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013); *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194-98 (3d Cir. 2009); *Perez v. United States*, 167 F.3d 913, 916-17 (5th Cir. 1999)—for the proposition that § 2401(b) is subject to tolling. However, these cases are not persuasive. *Arteaga* holds that because 28 U.S.C. § 2674 meant to hold the government liable in the same way as a private individual, and equitable tolling is available to private individuals, equitable tolling is available under the FTCA. *Arteaga*, 711 F.3d at 833. However, the *Arteaga* court ignores the plain language of § 2401(b) which states "to the agency to which it was presented." A private individual may not be held liable for an agency claim. Further, *Santos* ignores Congress' clear intent when it concludes that "the placement of the separate statutory savings provision does not suggest that Congress intended it to preclude equitable tolling." *Santos*, 559 F.3d at 196. *See* Pub. L. No. 773, 62 Stat. 869, 991 (1948) ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, . in which any section is placed."). Finally, *Perez* discussed the use of

relies on *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), which held that § 2401(a) is not jurisdictional. In fairness, the majority notes that this opinion's continued vitality was called into question by *Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 872 (9th Cir. 2009) ("To the extent that *Cedars-Sinai* is still valid after *John R. Sand*, the holding in *Cedars-Sinai* does not dictate the jurisdictional nature of section 7431(d)." (citation omitted)). It dismisses that statement, however, because it "was made without the benefit of the Supreme Court's most recent decisions clarifying the distinction between jurisdictional and nonjurisdictional rules." Op. at 16 n.2. Of course, this claim gets us nowhere, because *Cedars-Sinai* was also decided without the benefit of those decisions. Thus, we cannot blindly rely on *Cedars-Sinai*; instead, we must examine whether it accords with the Supreme Court's most recent guidance.[22]

Cedars-Sinai's analysis of the jurisdictional question is simple and brief. *See Cedars-Sinai*, 125 F.3d at 770. The court held: "Because the statute of limitations codified at 28 U.S.C. § 2401(a) makes no mention of jurisdiction but erects only a procedural bar, . . . we hold

---

the phrase "forever barred" and found it was irrelevant, but failed to consider and attempt to distinguish prior cases interpreting the term, such as *Perez v. U.S.*, 167 F.3d at 915-18, and *Finn v. U.S.*, 123 U.S. at 233.

[22] The Court's "recent guidance" includes *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), *Holland v. Florida*, 130 S. Ct. 2549 (2010), *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), and *Auburn Regional Medical Center*, 133 S. Ct. 817.

that § 2401(a)'s six-year statute of limitations is not jurisdictional, but is subject to waiver." *Id.* (citations omitted). Two problems with *Cedars-Sinai*'s analysis lead me to conclude that it is no longer good law.

First, *Cedars-Sinai* appears to erect an absolute rule that a statute of limitations is jurisdictional only when it specifically mentions the term "jurisdiction." *See Cedars-Sinai*, 125 F.3d at 770. Since *Cedars-Sinai* was decided, however, the Supreme Court has advised that Congress "need not incant magic words . . . to speak clearly [about jurisdiction]." *Sebelius*, 133 S. Ct. at 824.[23] A requirement that Congress use the term "jurisdiction" runs afoul of this instruction. Moreover, the Court has clarified that a statute of limitations may be jurisdictional when it "speak[s] in jurisdictional terms or refer[s] *in any way* to the jurisdiction of the district courts." *Reed Elsevier*, 559 U.S. at 165 (emphasis added). As previously discussed, one way to refer to the courts' jurisdiction is to

---

[23] In *Sebelius*, the governing statute allowed health care providers to file, within 180 days, an administrative appeal to the Provider Reimbursement Review Board from an initial determination of the reimbursement owed for inpatient services rendered to Medicare beneficiaries. *See id.* at 821 (citing 42 U.S.C. § 1395oo(a)(3)). The Secretary of the Department of Health and Human Services, by regulation, authorized the Board to extend the 180-day limitation, for good cause, up to three years. *See id.* The Court held that the 180-day limitation period was not jurisdictional and that the regulation permitting a three-year extension was a permissible construction of the statute. *See id.* at 821-22. It further held that equitable tolling "does not apply to administrative appeals of the kind here at issue." *Id.* at 822.

"suggest . . . that the provision was meant to carry jurisdictional consequences." *Henderson*, 131 S. Ct. at 1204. *Cedars-Sinai* failed to appreciate that, by providing that any claim not filed within the time specified "shall be barred," § 2401(a) limited the courts' power to act and, thus, referred to the courts' jurisdiction.

Second, *Cedars-Sinai* relied heavily on *Irwin*'s quotation of 28 U.S.C. § 2501, which the Court had deemed jurisdictional in *Soriano v. United States*, 352 U.S. 270 (1957).[24] After *Irwin*, there was initially good reason to believe *Soriano* had been overruled. *See Irwin*, 498 U.S. at 98 (White, J., concurring in part and concurring in the judgment) ("Not only is the Court's holding inconsistent with our traditional approach to cases involving sovereign immunity, it directly overrules a prior decision by this Court, *Soriano v. United States*." (citation omitted)). Because it seemed *Irwin* had overruled *Soriano*, it also

---

[24] In *Soriano*, the petitioner, a resident of the Philippines, filed suit in the Court of Claims to recover "just compensation for the requisitioning by Philippine guerilla forces of certain foodstuffs, supplies, equipment, and merchandise during the Japanese occupation of the Philippine Islands." *Id.* at 270-71. The relevant statute of limitations provided that "[e]very claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . within six years after such claim first accrues." *Id.* at 271 n.1 (quoting 28 U.S.C. § 2501). The petitioner filed suit more than six years after the alleged requisition claiming his delay was caused by World War II conditions in the Philippines. *See id.* at 271. The Court of Claims dismissed the suit without reaching the limitation question. *See id.* at 272. The Supreme Court affirmed and held that, by the time the petitioner filed suit, "his claim . . . was barred by statute." *Id.* at 277.

seemed the terms "shall be barred" were insufficient to make a statute jurisdictional. If that had been true, *Cedars-Sinai* may have been correct. But the Court has since clarified *Irwin* and reaffirmed *Soriano*'s vitality. *See John R. Sand & Gravel*, 552 U.S. at 137 ("[T]he Court [in *Irwin*], while mentioning a case that reflects the particular interpretive history of the court of claims statute, namely *Soriano*, says nothing at all about overturning that or any other case in that line. Courts do not normally overturn a long line of earlier cases without mentioning the matter." (citations omitted)). Given this clarification, and *Cedars-Sinai*'s tension with intervening Supreme Court decisions, I would hold that it was incorrectly decided and is of no precedential value on this issue. *See Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 782-83 (9th Cir. 2008) (explaining that circuit precedent is "effectively overruled" when its "reasoning or theory . . . is clearly irreconcilable with the reasoning or theory of intervening higher authority." (internal quotation marks and citations omitted)).

The majority then cites *Partlow v. Jewish Orphans' Home of Southern California*, 645 F.2d 757, 760-61 (9th Cir. 1981), *abrogated on other grounds by Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), and *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 396-407 (9th Cir. 1980), as instances where this court has held that the language "shall be forever barred" did not render a statute jurisdictional. *See* Op. at 17. Of course, these cases pre-date all of the Supreme Court's recent guidance as well. For that reason, we should once again take a critical look at their reasoning before relying on them.

The *Partlow* court held that equitable tolling could be applied to 29 U.S.C. § 255, the statute of limitations applicable to actions brought under the Fair Labor Standards Act. *See Partlow*, 645 F.2d at 760-61. Interestingly, the court did not conduct any in-depth analysis of the statute's text, context, or historical treatment. Indeed, the *Partlow* opinion does not once quote the statute's text or even mention the phrase "shall be forever barred." *See id.* at 757-61. Instead, the court relied on opinions from two of our sister circuits, each of which held that § 255 could be equitably tolled. *See id.* at 760 (citing *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975), and *Hodgson v. Humphries*, 454 F.2d 1279, 1283-84 (10th Cir. 1972)). It then noted that "courts have often stated that equitable tolling is read into *every* federal statute of limitations." *Id.* (citation omitted) (emphasis added). It then concluded that the statute should be tolled in the circumstances of that case. *See id.* at 760-61.

If it were unclear at the time *Partlow* was decided, it has since become abundantly clear that equitable tolling is not to be read into *every* federal statute of limitations. *See John R. Sand & Gravel*, 552 U.S. at 133-34 (explaining that some federal statutes of limitations—such as 28 U.S.C. § 2501, for instance—must be treated as jurisdictional, so that courts are forbidden to "consider whether certain equitable considerations warrant extending [the] limitations period[s]" they contain). Moreover, *Partlow* fails to conduct the kind of analysis required by the Court's more recent decisions. *See Reed Elsevier*, 559 U.S. at 166 (providing that "the jurisdictional analysis must focus on the 'legal character' of the requirement, which we discern[] by looking to the condition's text, con-

text, and relevant historical treatment" (citations omitted)). For these reasons, I would hold that *Partlow* is today flat wrong, and of no precedential value on the question presently before the court.

In *Mt. Hood Stages*, this court held that equitable tolling could be applied to 15 U.S.C. § 15b. *See Mt. Hood Stages*, 616 F.2d at 396. It is once again telling that the court did not conduct any in-depth analysis of the statute's text or even mention the statute's phrase "shall be forever barred." *See id.* at 396-406. It is clear, then, that the decision was not based on a determination that the statute did not refer in any way to the courts' jurisdiction. In a word, *Mt. Hood Stages* skipped the first, Court-required step of textual analysis for a consideration of the statute's purpose in a regulatory scheme. *See Reed Elsevier*, 559 U.S. at 166.[25] Instead, the decision was based on the court's conclusion that "tolling the running of limitations serves the important federal interest in accommodating enforcement of the Sherman Act with enforcement of the Interstate Commerce Act, and is not inconsistent with the purposes of the Clayton Act's limitation period." *Id.* at 396.

In particular, the *Mt. Hood Stages* court found that tolling would "contribute[] to a reasonable accommodation of the [Interstate Commerce Commission]'s responsibility for furthering the national transportation policy with the responsibility of the courts to effectuate the national antitrust policy." *Id.* at 397. Because the case "involved

---

[25] This dissent analyzes § 2401(b)'s purposes in Part III, *infra*.

subject matter Congress ha[d] given the Commission jurisdiction to regulate," it "created a dispute *only* the Commission could resolve." *Id.* (emphasis added). The court noted that, "[i]f Mt. Hood had filed [its] antitrust suit . . . prior to the Commission determination [of a particular factual issue]," accommodation of the Clayton and Interstate Commerce Acts would have compelled "the court . . . to dismiss or stay the suit pending the necessary administrative determination." *Id.* at 399. Thus, "[c]ongressional purposes under the two statutory regimes would be served by tolling the statute of limitations during the Commission proceeding." *Id.* at 400. For that reason, the court held that the statute of limitations could be "tolled pending resort to an administrative agency for a preliminary determination of issues within its primary jurisdiction." *Id.* at 405; *see also Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987) ("[O]ur decision [in *Mt. Hood Stages*] rested on considerations of federal policy and primary jurisdiction which are not present here.").

Contrary to the majority's implication, *see* Op. at 16, *Mt. Hood Stages* does not stand for the proposition that "shall be forever barred" does not refer to the courts' jurisdiction. Indeed, a statute may *refer* to the courts' jurisdiction and yet not be jurisdictional, much like a statute which does not speak in jurisdictional terms may still be jurisdictional. *See United States v. Brockamp*, 519 U.S. 347, 352 (1997) (holding that the timing requirements of 26 U.S.C. § 6511 are jurisdictional, even though the statute does not refer to the courts' jurisdiction, because of the provision's "detail, its technical language, the iteration of the limitations in both procedural and substantive

forms, and the explicit listing of exceptions"). In short, even a statute that refers in some way to the courts' jurisdiction may not be jurisdictional when, for example, Congress has created dual statutory regimes, such as those involved in *Mt. Hood Stages*, that essentially require tolling for their accommodation. Of course, there are no such dual regimes at issue in this case, nor does this case involve the sort of federal policy and primary jurisdiction considerations that animated the court's opinion in *Mt. Hood Stages*. Thus, I would hold that *Mt. Hood Stages* offers no useful guidance on the question whether § 2401(b)'s language refers to the courts' jurisdiction.

In defense of *Partlow* and *Mount Hood Stages*, the majority states that these cases still "undermine the notion that Congress intended through the use of magic words . . . to establish jurisdictional bars in statutes allowing for civil suits against private parties." Op. at 22, n.5. Of course, this argument is merely a straw man; we all agree that Congress never uses "magic words" to establish jurisdiction. *See supra*, Bea Dissent at 75, n.17.

III. The Statute's Purpose

As earlier noted, in *John R. Sand & Gravel*, the Court identified the kinds of goals that make statutes of limitations jurisdictional: "[Jurisdictional] statutes of limitations . . . seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." 552 U.S. at 133. Consideration of each of the goals outlined in *John R. Sand & Gravel* illustrates that § 2401(b)'s

broad, system-related purposes require us to find that its timing provisions are indeed jurisdictional.

A. Section 2401(b) Facilitates the Administration of Claims

The Court has held that § 2401(b)'s "obvious purpose" is to "encourage the prompt presentation of claims." *See United States v. Kubrick*, 444 U.S. 111, 117 (1979).[26] The requirement that a civil action be filed within six months of a denial of an administrative claim guarantees that the civil action will commence while the denial of the claim is relatively fresh. For actions filed within that time period,

---

[26] In *Kubrick*, the respondent, a veteran, was admitted to a VA hospital for treatment of an infected femur in April 1968. *See id.* at 113. Medical personnel irrigated the infected area with neomycin, an antibiotic, until the infection cleared. *See id.* Six weeks later, the respondent noticed some hearing loss. *See id.* at 114. In January 1969, doctors informed the respondent that it was "highly possible" that the neomycin treatment caused his hearing loss. *See id.* In 1972, the respondent filed suit under the FTCA, alleging he had been injured by negligent treatment at a VA hospital. *See id.* at 115. The VA denied the respondent's administrative claim, which he presented after he filed suit, in April 1973. *See id.* at 116 n.4. The Government then filed a motion to dismiss the suit as time-barred under 28 U.S.C. § 2401(b)'s two-year statute of limitations, on the theory that the respondent's claim accrued in January 1969, when doctors told the respondent that his hearing loss was likely caused by the neomycin treatment. *See id.* at 115. The district court rejected this defense and rendered judgment for the respondent. *See id.* The Third Circuit affirmed. *See id.* at 116. The Supreme Court reversed and held that claims accrue when the individual "knows both the existence and the cause of his injury." *See id.* at 113, 124-25.

the Department of Justice, which will defend the cases, will be able to access the relatively fresh memories of the administrators who denied the claim. It is also more likely that those administrators will be on the job six months after the denial of the claim than would be the case if the denial had taken place years before.

B. Section 2401(b) Limits a Waiver of Sovereign Immunity

The Court has held that § 2401(b) limits the waiver of sovereign immunity expressed in the FTCA. *See Kubrick*, 444 U.S. at 117-18. In particular, the Court has stated:

> "We should . . . have in mind that the [FTCA] waives the immunity of the United States and that in construing the statute of limitations [expressed in § 2401(b)], *which is a condition of that waiver*, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."

Id. (emphasis added). This passage clearly identifies § 2401(b) as a provision "limiting the scope of a governmental waiver of sovereign immunity," which is exactly the kind of broader, system-related goal that makes a statute's time limit "more absolute." *See John R. Sand & Gravel*, 552 U.S. at 133; Op. at 32.

The majority agrees that the FTCA "is predicated on a sovereign immunity waiver." Op. at 31. Further, the majority admits that many of the cases upon which they rely—*Auburn Regional Medical Center*, *Gonzalez*, *Henderson*, *Holland*, and *Bowles*—do *not* involve issues of government immunity and therefore "may not raise pre-

cisely parallel sovereign immunity concerns" as are now before us. *See* Op. at 32 n.12. The majority is unable to deny that (1) the FTCA limits waiver of sovereign immunity and therefore meets a goal that makes statutes of limitations jurisdictional under *John R. Sand & Gravel*, or (2) this difference distinguishes the FTCA and § 2401(b) from other cases on which the majority tries to rely.

C. Section 2401(b) Promotes Judicial Efficiency

First, like all statutes of limitations, § 2401(b) "protect[s] . . . the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *See Kubrick*, 444 U.S. at 117. By promoting the prompt presentation of claims, § 2401(b) seeks to limit the amount of evidence lost to time and ensure that courts will adjudicate cases with complete records. *See id.*

Second, when read together with § 2675, it is clear that § 2401(b) was intended to protect against the burdens of claims filed outside of its time prescriptions. In *McNeil v. United States*, the Court held that § 2675's administrative exhaustion requirement was jurisdictional. 508 U.S. 106, 111-12 (1993). There, the petitioner filed a complaint in federal district court alleging that the United States Public Health Service had injured him while conducting experimentation on prisoners in the custody of the Illinois Department of Corrections. *See id.* at 108. Four months later, he submitted a claim for damages to the Department of Health and Human Services. *See id.* at 109. After the Department denied the claim, the peti-

tioner sent the district court a letter and asked that it permit him to commence his legal action. *See id.* The court held that it lacked jurisdiction to entertain an action commenced before satisfaction of § 2675's administrative exhaustion requirement. *See id.* The Seventh Circuit affirmed and held that the petitioner had filed his action too early. *See id.*

The Supreme Court affirmed and held that § 2675's administrative exhaustion requirement was a jurisdictional prerequisite to filing suit under the FTCA. *See id.* at 112-13. As relevant here, it noted that "every premature filing of an action under the FTCA imposes some burden on the judicial system. . . ." *Id.* at 112. Similar burdens are imposed on the judicial system when actions are filed late, accompanied by claims that the court should toll the running of the statute of limitations for equitable reasons which may or may not justify the plaintiff's tardiness. As was the case for premature filings in *McNeil*, "the burden may be slight in the individual case." *Id.* But § 2401(b) "governs the processsing of a vast multitude of claims." *Id.* For that reason, "adherence to the straightforward statutory command" is the best way to promote "[t]he interest in orderly administration of this body of litigation." *Id.*

Because § 2401(b) serves each of the three system-related purposes identified in *John R. Sand & Gravel* as making statutory time limits "more absolute," equitable tolling should not be applied here. Instead, we should hold that § 2401's time limits are jurisdictional in nature.

IV. The Statute's Context

Section 2401(b)'s context includes its placement in the larger statutory scheme, as well as any relevant exceptions Congress may have legislated. It also includes the Supreme Court's "interpretation of similar provisions in many years past." *Reed Elsevier*, 559 U.S. at 168.

A. The Supreme Court's Interpretation of Similar Provisions

The majority correctly notes that "there has not been . . . a venerable, consistent line of [Supreme Court] cases treating the FTCA limitations period as jurisdictional" and, indeed, that "there is no Supreme Court precedent on the question."[27] Op. at 30. Still, the Supreme Court has examined similar provisions and offered guidance useful here. As previously stated, *Kubrick* and *John R. Sand & Gravel*, taken together, strongly suggest that § 2401(b)'s time limits are jurisdictional.

The Court's analysis in *McNeil* only bolsters this conclusion. There, the Court held that 28 U.S.C. § 2675(a)

---

[27] The majority's focus is—jurisprudentially speaking—far too narrow. *See Reed Elsevier*, 559 U.S. at 168 ("[T]he relevant question here is not . . . whether [the statute] itself has long been labeled jurisdictional, but whether the type of limitation that [the statute] imposes is one that is properly ranked as jurisdictional absent an express designation."). Section 2401(b) expresses the same "type of limitation" the Court held jurisdictional in *Soriano* and *John R. Sand & Gravel*. See 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.").

"bars claimants from bringing suit in federal court [under the FTCA] until they have exhausted their administrative remedies." *McNeil*, 508 U.S. at 113. This requirement is jurisdictional. Courts cannot entertain a suit brought before exhaustion of administrative remedies, even if the claimant exhausts those remedies before "substantial progress [is] made in the litigation," because such a suit was filed too early. *Id.* at 110-11. Here, there is no dispute that, like the petitioner in *McNeil*, Wong filed her action before denial of her administrative claim and was similarly premature.

The majority emphasizes that § 2675(a) is located in chapter 171 and that Congress expressly conditioned the district courts' jurisdiction upon plaintiffs' compliance with the provisions of that chapter. *See* Op. at 23. In *McNeil*, however, the Court did not even mention this fact. Instead, it based its decision on two considerations: (1) the statutory text is unambiguous and expresses Congress's intent to require complete exhaustion of administrative remedies, and (2) "[e]very premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions." *McNeil*, 508 U.S. at 111-12. With respect to the premature filing, the Court noted that, "[a]lthough the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims," such that "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *Id.*

The Court's language suggests once again that the FTCA's timing requirements fit into the jurisdictional

category. *See John R. Sand & Gravel*, 552 U.S. at 133 (identifying "facilitating the administration of claims" as one of the broader, system-related goals that makes a statutory time limit "more absolute"). In *McNeil*, the Court took a systemic view of its decision; it was concerned with the "orderly administration of this body of litigation" precisely because § 2675(a) "governs the processing of a vast multitude of claims." *McNeil*, 508 U.S. at 112. Because the same is true of § 2401(b), our analysis should feature the same concern. And, when one takes this more systemic view of § 2401(b), one will surely find that every premature—or late—filing imposes a burden on the judicial system and on the Department of Justice and agree with the Court that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 113.[28]

---

[28] The majority notes that § 2675 is silent as to the deadline for filing a properly exhausted claim in the district court and concludes that "there is no contextual reason to think that the limitations period provisions are also jurisdictional." Op. at 28. But § 2675 does not require only that individuals exhaust their administrative remedies; instead, it specifies that individuals must exhaust their administrative remedies first (i.e. before they file complaints in federal court). *See* 28 U.S.C. § 2675(a). Thus, the statute requires a particular timing of administrative exhaustion, and the *McNeil* Court found this timing requirement significant. *See McNeil*, 508 U.S. at 111 (noting that the "petitioner's complaint was filed too early"); *id.* at 112 (addressing the burdens premature filings impose on the judicial system and the Department of Justice). Just as in *McNeil*, appellant Wong's complaint was filed "too early" and imposed a burden on the judicial system and Department of Justice. Because late

B. Placement

Seeking another interpretive tool to support its position, the majority emphasizes the fact that § 2401(b) is located in a provision separate from the FTCA's jurisdiction-granting provision. *See* Op. at 23. With respect, this fact is irrelevant. As the Court has explained, "some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, while others are not, even when incorporated into the jurisdictional provisions." *Barnhart*, 537 U.S. at 159 n.6 (citations omitted). "Formalistic rules do not account for the difference, which is explained by contextual and historical indications of what Congress meant to accomplish." *Id.*

Even more problematic to the majority's analysis of the FTCA's reorganization in 1948, *see* Op. at 26, is the inconvenient enactment of a law rejecting placement in the Act as a valid interpretive tool. The majority acknowledges that, before 1948, Congress had expressly conditioned the grant of jurisdiction over tort claims against the United States upon plaintiffs' compliance with, among other things, the FTCA's original limitations provision. *See* Op. at 26. In 1948, however, Congress reorganized the FTCA and placed the limitations provision in chapter 161 and other provisions, such as § 2675, in chapter 171. *See* Op. at 26. It appears the majority would conclude from this fact that Congress intended to separate jurisdictional

---

filings impose similar burdens on the courts and the Department of Justice, there is good reason to believe that the limitations period expressed in § 2401(b) is also jurisdictional.

requirements (§ 2675) from non-jurisdictional ones (§ 2401). Congress, however, expressly rejected this possible reading of its reorganization efforts by an enactment of law. *See* Pub. L. No. 773, 62 Stat. 869, 991 (1948) ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, . . . in which any section is placed."). The majority simply ignores this Act of Congress, perhaps because it cuts directly against the majority's desired result: interpretive value based on the statute's placement.

Congress clearly stated that the placement of § 2401 in chapter 161 was not intended to change the way it should be interpreted. If Congress intended to condition the grant of jurisdiction over tort claims against the United States on compliance with the limitations period, the recodification in 1948 should not be read to alter that intent. That Congress later amended the jurisdiction-granting provision to provide that the district courts would have exclusive jurisdiction over FTCA actions "[s]ubject to the provisions of chapter 171 of this title," 28 U.S.C. § 1346(b)(1), says nothing about the jurisdictional status of a provision located in chapter 161.

C. The Significance of § 2401(a)'s Exceptions

"[A]s a general rule, . . . Congress's use of certain language in one part of [a] statute and different language in another can indicate that different meanings were intended." *Sebelius*, 133 S. Ct. at 825. As relevant here, § 2401(b) enumerates no exceptions, while § 2401(a) provides that "action of any person under legal disability or beyond the seas at the time the claim accrues may be

commenced within three years after the disability ceases." 28 U.S.C. § 2401(a). The relevant meaning to be inferred from *Sibelius*' interpretive canon quoted above is that Congress did not intend for any exceptions to be applied to § 2401(b). The majority is correct that this canon, standing alone, does not constitute a "clear statement" by Congress. *See* Op. at 28. The canon can, however, "tip the scales when a statute could be read in multiple ways." *Sebelius*, 133 S. Ct. at 826. I would not hold that consideration of this canon alone dictates a conclusion that § 2401(b)' s time limit is jurisdictional, but it reinforces that conclusion when considered with the statute's text and context.

V. Conclusion

Congress clearly expressed its intent that § 2401(b) would have "jurisdictional" consequences. Jurisdictional treatment accords with the statute's text and the Supreme Court's analysis of similar provisions. For these reasons, equitable tolling should not be applied to the time limits contained in § 2401(b). I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-JO

KWAI FUN WONG; ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE ET AL., DEFENDANTS

Oct. 28, 2010

OPINION AND ORDER

JONES, Judge:

In this protracted litigation, which the Ninth Circuit recently returned—once again—to this court, defendant United States moves (# 504) the court to reconsider a decision Magistrate Judge Stewart rendered in February 2006, and this court adopted in April 2006. *See Kwai Fun Wong, et al. v. Beebe, et al.*, Civil No. 01-718-ST (Findings and Recommendation, Feb. 14, 2006) (# 325), adopted by Order (April 10, 2006) (Jones, J.) (# 358). Specifically, defendant asks this court to reconsider the decision to apply equitable tolling to excuse plaintiffs late

filing of her Federal Tort Claims Act ("FTCA") claim for negligence, which is plaintiffs only surviving claim.[1]

Without question, Judge Stewart applied, and this court adopted the application of, principles of equitable tolling in permitting plaintiff's late filing. Findings and Recommendation, pp. 6-9. And also without question, under Ninth Circuit precedent then and now, the court should have dismissed the untimely FTCA claim for lack of jurisdiction. As the Ninth Circuit recently clarified:

> [T]he six-month statute of limitation in § 2401(b) [of the FTCA] is jurisdictional and . . . the failure to file a claim within that time period deprives the federal courts of jurisdiction. Accordingly, the doctrines of equitable estoppel and equitable tolling do not apply.

Marley v. United States, 567 F.3d 1030, 1038 (9th Cir. 2009). In so stating, the Ninth Circuit explained in detail that it had "long held that § 2401(b) is jurisdictional," citing Ninth Circuit precedent supporting that view and explaining away a contrary 1996 panel decision. *See Marley*, 567 F.3d at 1035-36, 1037-38. Consequently, plaintiff's contention that *Marley* should not be applied retroactively is misplaced.

Accordingly, defendant's motion (# 504) for reconsideration must be granted. On reconsideration, I conclude that this court has lacked jurisdiction over plaintiff's un-

---

[1] The history of this litigation is well-documented in numerous decisions by this court and the Ninth Circuit, and need not be repeated here.

timely filed FTCA claim since she first filed the claim in August 13, 2002.

CONCLUSION

Defendant's Motion for Reconsideration (# 504) is GRANTED. Plaintiff having no surviving claims, this action is dismissed with prejudice. Any other pending motions are denied as moot.

DATED this *28th* day of October, 2010.

/s/ ROBERT E. JONES
ROBERT E. JONES
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG AND WU WEI TIEN TAO ASSOCIATION, PLAINTIFFS,

v.

DAVID V. BEEBE, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

Apr. 10, 2006

ORDER

JONES, Judge:

Magistrate Judge Janice M. Stewart filed Findings and Recommendation (#325) on February 14, 2006, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1);

McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiff Wong and Defendants have timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Stewart's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Stewart's Findings and Recommendation (#325) dated February 14, 2006, in its entirety. Plaintiff Kwai FunWong's Motion (#192) for partial summary judgment is denied and the United States' cross-motion (#206) for partial summary judgment on plaintiff Kwai Fun Wong's false imprisonment claim is granted without prejudice. Accordingly, the United States is granted summary judgment against the portion of the Fifth Claim for Relief by Wong alleging a violation of the FTCA based on the tort of false imprisonment. However, Wong is granted leave to replead her FTCA claim to the extent she can allege a viable tort claim outside the due care exception to the FTCA concerning the manner in which she was detained when defendants executed the expedited removal order.

IT IS SO ORDERED.

DATED this *10th* day of April, 2006.

/s/ ROBERT E. JONES
ROBERT E. JONES
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV-01-718-ST

KWAI FUN WONG AND WU WEI TIEN TAO ASSOCIATION, PLAINTIFFS

v.

DAVID V. BEEBE, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

Feb. 14, 2006

FINDINGS AND RECOMMENDATION

STEWART, Magistrate Judge:

INTRODUCTION

Following a July 24, 2002 appeal to the Ninth Circuit (*Wong v. United States Immigration & Naturalization Serv., et al*, 373 F.3d 952 (9th Cir. 2004)), and further proceedings in this court on remand, plaintiffs filed a Fourth Amended Complaint (docket #170).

Plaintiff Kwai Fun Wong ("Wong") has now filed a Motion for Partial Summary Judgment Against the United States (docket #192), and the United States has filed a Cross-Motion for Partial Summary Judgment on Plaintiff Kwai Fun Wong's False Imprisonment Claim (docket #206). For the reasons that follow, this court recommends that Wong's motion be denied and the United States cross-motion be granted without prejudice and with leave to amend.

ANALYSIS

These two motions concern that portion of Wong's Fifth Claim for Relief under the Federal Tort Claims Act ("FTCA") alleging a claim for false imprisonment.

I. Background Facts and Pertinent Allegations

The factual and procedural history of this case has been throughly discussed in this court's prior opinions, as well as in the Ninth Circuit's decision, and need not be repeated here. The pertinent factual history and allegations are set forth only as necessary to rule on the pending motions.

II. Timeliness of the FTCA Claim

The United States contends that this court has no subject matter jurisdiction over Wong's FTCA claim because that it is untimely. For the reasons that follow, that argument is rejected.

A. Procedural History of the FTCA Claim

Wong alleges that she is a citizen of Hong Kong, the Matriarch of the Tao Heritage, and the leader of plaintiff Wu-Wei Tien Tao Association ("Association"), a worldwide

non-profit religious organization registered in Oregon. Fourth Amended Complaint, ¶¶ 3-4. In their Fifth Claim for Relief, Wong and the Association allege that the United States is liable to them under the FTCA for the torts of: (1) false imprisonment (as to Wong only); (2) intentional interference with economic relations; and (3) negligence (as to Wong only). *Id*, ¶ 46. Both plaintiffs seek awards of economic damages on this claim, and Wong also seeks non-economic damages. *Id*, ¶ 47.

The detention that forms the basis of Wong's FTCA claim for false imprisonment took place on June 17, 1999, when the United States Immigration and Naturalization Service ("INS")[1] detained Wong at its Portland, Oregon office. On that same date, Wong was arrested, handcuffed and taken to the Multnomah County Detention Center ("MCDC"). *Id*, ¶ 17. Wong was imprisoned at MCDC for five days, during which time she alleges that she was subjected to unlawful conditions of confinement.[2] *Id*, ¶¶ 17-18. On June 22, 1999, Wong was removed from the United States and remains outside the country. *Id*, ¶ 20.

On May 18, 2001, plaintiffs simultaneously filed the original Complaint in this case and hand-delivered admin-

---

[1] All functions of the INS have now been transferred to the Department of Homeland Security. However, because this agency was known as the INS at all times relevant to plaintiffs' allegations, this court will refer to it as the INS, as did the Ninth Circuit. *Wong*, 373 F.3d at 958 n.4.

[2] The conditions of Wong's confinement are the subject of other claims in the Fourth Amended Complaint.

istrative claim against the INS. Plaintiff's Exhibits 16-17.[3] Neither the original Complaint (docket #1) filed on May 18, 2001, nor the First Amended Complaint (docket #30) filed on October 17, 2001, included a claim against the United States under the FTCA.[4] On October 30, 2001, defendants filed a Motion to Dismiss the First Amended Complaint (docket #31), which this court set for oral argument along with several other pending motions on December 17, 2001. Minute Order dated November 5, 2001 (docket #41).

On November 9, 2001, plaintiffs filed a Motion to Allow Filing of a Second Amended Complaint (docket #44), seeking to add their claim under the FTCA on or after November 20, 2001, when the administrative claim would have been deemed denied. 28 USC § 2675(a) ("The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section."). On November 14, 2001, plaintiffs filed an Amended Motion to Allow Filing of a Second Amended Complaint (docket #46). The purpose of that amended motion was to add a claim for attorney fees under the RFRA, which was inadvertently omit-

---

[3] References to Plaintiffs' Exhibits are to those documents attached to the Affidavit of Tom Steenson with Exhibits in Support of Plaintiff Kwai Fun Wong's Motion for Partial Summary Judgment Against Defendant United States of America (docket #195).

[4] The First Amended Complaint did contain other claims against the United States for declaratory relief (Third Claim) and violation of RFRA (Fourth Claim).

ted from the first motion to amend. Absent a request for expedited consideration, that amended motion went advisement on December 17, 2001. LR 7.1(g); *see* Minute Order dated November 20, 2001 (docket #47) (setting oral argument on docket #46 for December 17, 2001). Shortly thereafter, on December 3, 2001, the INS issued a written decision denying plaintiffs' administrative claim because plaintiffs "have exercised [their] option under § 2675(a) to file suit." Government Exhibit 19.

On December 17, 2001, this court heard oral argument on the pending motions. After receiving additional briefing, on January 29, 2002, this court struck the case schedule and took all the pending motions under advisement, including defendants' motions to dismiss, to compel and to clarify, as well as plaintiffs' motion for a stay of discovery and to amend to include their FTCA claim. On April 5, 2002, this court issued an Order, Findings, and Recommendations (docket #62) ("F&R"), which, among other things, granted plaintiff's motion to amend and recommended denial of defendants' motion to dismiss. District Court Judge Robert E. Jones adopted the F&R in its entirety on June 25, 2002. Order (docket #69). Almost six weeks later, on August 13, 2002, plaintiffs filed the Second Amended Complaint (docket #83) which contained the FTCA claim.

B. Filing Time Lines for FTCA Claims

Defendants argue that plaintiffs filed their FTCA claim either too early or too late. However, this court concludes that plaintiffs' FTCA claim should be deemed timely.

In order to proceed with a claim against the United States under the FTCA, the plaintiff must file an administrative claim against the relevant federal agency. The statute governing such claims provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 USC § 2401(b).

This statute requires that a plaintiff meet two limitations periods. "A claim must be filed with the agency within two years of the claim's accrual and the claimant must file suit within six months of administrative denial of the claim. If either requirement is not met, suit will be time barred." *Dyniewicz v. United States*, 742 F2d 484, 485 (9th Cir. 1984). Wong timely filed her administrative claim for false imprisonment with the INS. However, the government contends that she did not commence her FTCA claim within six months after the INS denied her claim on December 3, 2001. If the action is deemed to have begun on November 9 or 14, 2001, when plaintiffs filed their motions to amend their pleadings to add a claim under the FTCA, then the government argues that it was filed too early. At that point, the INS had not yet denied the claim. Alternatively, if the action is deemed to have begun on August 13, 2002, with the filing of the Second Amended Complaint, then the government argues that it

was filed too late since the six month period expired on June 3, 2002.

The "obvious purpose [of 28 USC § 2401(b)] is to encourage the prompt presentation of claims" against the United States. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Where those ends have been met and where there is no prejudice to the United States, equitable tolling may be warranted by the interests of justice. "The purpose of a statute of limitation is 'to prevent assertion of stale claims against a defendant.' Where the danger of prejudice to the defendant is absent, and the interests of justice so require, equitable tolling of the limitations period may be appropriate." *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) quoting *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1136 (9th Cir. 2001) and citing *Stoll v. Runyon*, 165 F3d 1238, 1242 (9th Cir. 1999).

In this case, the government was not faced with the presentation of stale claims and has made no showing of any prejudice whatsoever. To the contrary, the government was fully apprised of plaintiffs' claims by their administrative filing, had full notice of plaintiffs' intended FTCA claim just prior to the expiration of the six-month administrative review period, and was aware that plaintiffs were seeking to add the FTCA claim to this case *after* expiration of the six-month administrative review period. *See* Amended Motion to Allow Filing of Second Amended Complaint (docket #46) moving "for an order allowing the filing of plaintiffs' Second Amended Complaint *on or after November 20, 2001*.").

In response to plaintiffs' motion to amend, defendants argued that the "only way for Plaintiffs to properly invoke

this Court's jurisdiction under the FTCA is to institute a new action once they have completely exhausted their administrative remedies." Memorandum in Support of Defendants' Opposition to Plaintiffs' Motions to Allow Filing of Second Amended Complaint (docket #50), p. 5 (citations omitted). On April 5, 2002, this court rejected that argument and allowed the filing of a Second Amended Complaint adding an FTCA claim. F&R (docket #62), pp. 45-47. At that point in time, plaintiffs had exhausted their administrative remedies and were within the window of time allowed for filing their FTCA claim. However, this court also issued a recommendation denying defendants' Motion to Dismiss the First Amended Complaint (docket #31) to which the government filed objections. Until a final ruling was issued on that motion two months later, it was not clear to the parties which claims plaintiffs could include in a further amended complaint. By that time, more than six months had passed since the denial of plaintiffs' administrative claim.

Accepting the position of the government on this issue would effectively impose on plaintiffs a court-created Catch-22 and make a mockery of this court's prior ruling allowing the filing of the FTCA claim in this action, while doing nothing to serve the intended purpose of the statute of limitations in preventing the assertion of stale claims. No case of which this court is aware addresses a situation quite on point with the one here. In essence, the government seeks to deny plaintiffs an opportunity to present their FTCA claims due solely to the delay inherent in the Magistrate Judge system. Absent consent of the parties, Magistrate Judges make recommendations to a district court judge on dispositive pretrial matters. 28 USC

§ 636(b) & (c). This necessarily causes delay in entry of a final order. Had the government filed no objections by April 26, 2002, to the recommendation denying their motion to dismiss, then the F&R would have been immediately referred to Judge Jones who would have issued a final ruling shortly thereafter and well before June 3, 2002. Alternatively, had all parties consented to a Magistrate Judge, then this court's ruling on the motion to dismiss would have been final, which would have given plaintiffs over eight weeks within which to add the FTCA claim prior to the expiration of the six-month period set forth in 28 USC § 2401(b). Instead, no final ruling on the motion to dismiss was issued until several weeks after that period expired.

This court will not countenance the result that defendants seek, namely that plaintiffs' FTCA claims be deemed premature or too late based upon the happenstance of the timing of this court's rulings. Plaintiffs had already instituted this action alleging other claims against defendants, including the United States. They did not prematurely file their FTCA claims, nor did they seek to do so when they filed their motions to amend. Instead, they sensibly sought to add to this case the FTCA claims which arise out of the identical events as do their other claims. Plaintiffs moved to amend just prior to the expiration of six months from the date they filed their administrative claim and expressly included a request that they be allowed to add their FTCA claims to this action after that period expired. This court allowed them to do so. However, plaintiffs appropriately waited until a final ruling on the defendants' motion to dismiss to file their amended complaint. By then, plaintiffs would know which claims to include in

order to comply with the court's rulings. The government seeks to use the time period between issuance of this court's April 5 and June 25, 2002 rulings to its advantage, arguing that plaintiffs FTCA claims are barred because their August 13, 2002 Second Amended Complaint was filed too late and cannot relate back to earlier pleadings because plaintiffs' motions to amend were filed too early.

The government has suffered no prejudice whatsoever and the purposes of the administrative filing requirements and time lines have been more than met. The government had notice of the intended FTCA claims with the filing of the motions to amend and now simply seeks to gain an unwarranted advantage.

Accordingly, this court concludes that in the interests of justice, the limitations period should be tolled for the 81 days between issuance of the April 25, 2002 F&R on the motion to dismiss and the June 25, 2005 final order adopting that F&R. Adding that period of time to the limitations period would require plaintiffs to have begun action on their FTCA claims no later than August 23, 2002. As a result, the FTCA claims asserted in the August 13, 2002 Second Amended Complaint are rendered timely.

Thus, to the extent it is premised upon the applicable statute of limitations, the United States' motion for summary judgment against the false imprisonment portion of the FTCA should be denied. However, as explained below, the motion should be granted on the basis that there has been no waiver of the sovereign immunity of the United States, at least with respect to the false imprisonment claim.

III. Waiver of Sovereign Immunity Under the FTCA

The United States also argues that the portion of the Fifth Claim alleging a claim for false imprisonment by Wong under the FTCA fails because the United States has not waived sovereign immunity. This court agrees and, therefore, concludes that although the FTCA claim should be deemed timely filed, this court nevertheless lacks subject matter jurisdiction over the false imprisonment portion of Wong's Fifth Claim for Relief. However, Wong should be allowed leave to plead a claim based on intentional conduct about the manner in which she was detained when defendants executed the expedited removal order.

The FTCA "provides a limited waiver of the sovereign immunity of the United States for torts committed by federal employees acting within the scope of their employment." *Nurse v. United States.*, 226 F.3d 996, 1000 (9th Cir. 2000). When the FTCA applies, the United States may be held civilly liable for the torts of its employees "in the same manner and to the same extent as a private individual under like circumstances." 28 USC § 2674. However, where the claim falls within one or more of the statutory exceptions to the FTCA, then the "cause of action must be dismissed for want of federal subject matter jurisdiction." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F3d 840, 853-54 (10th Cir. 2005) (citations omitted); *see also Nurse*, 226 F3d at 1000.

The FTCA specifically waives sovereign immunity for liability arising out of certain intentional torts, including false imprisonment or false arrest, when committed by federal investigative or law enforcement officers, including INS officials. 29 USC § 2680(h); *Caban v. United States*, 671 F2d 1230, 1234 n.4 (2nd Cir. 1982). However, one of

the enumerated exceptions to the FTCA's waiver of sovereign immunity is any claim: (1) "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid;" or (2) based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 USC § 2680(a). These so-called "due care" and "discretionary function" exceptions completely bar any claim within their ambit:

> The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. . . . [T]he FTCA allows neither jury trial nor punitive damages. And recovery may be barred altogether if the claim arises from a "discretionary function" or the "execution of a statute or regulation, whether or not such statute or regulation is valid."

Carlson v. Green, 446 U.S. 14, 28 n.1 (1980) (Powell, J. and Stewart, J., concurring), quoting 28 USC § 2680(a).

Central to Wong's false imprisonment claim under the FTCA is her contention that her detention was illegal because the INS had no authority to detain her. Wong argues that she was not an "arriving" alien pursuant to *Sissoko v. Rocha*, 412 F.3d 1021 (9th Cir. 2005) and *Rosenburg v. Flueti*, 374 US 449 (1963) because her departure was "brief, casual, and innocent." This court previously considered and rejected this argument prior to the decision in *Sissoko*. See F&R (docket #62), pp. 17-25; *see*

also, Wong, 373 F3d at 974 (describing due process rights of "non-admitted aliens such as Wong"). *Sissoko* does not appreciably alter the legal landscape relative to this issue. *Sissoko* was a "legalization" applicant under 8 USC § 1255a (as opposed to an applicant for adjustment of status under 8 USC § 1255) and departed the country with advance parole. Unlike Sissoko, Wong did not obtain advance parole prior to departing the United States and did not qualify for adjustment of status under 8 USC § 1255a, a statute which expressly provides that "brief, casual, and innocent absences from the United States" will not interfere with an assertion of "continuous physical presence in the United States" for purposes of legalization proceedings. Thus, this court adheres to its prior rulings on this subject and concludes that neither *Sissoko* nor *Flueti* provide a basis from which to argue that Wong was not subject to the expedited removal statute, 8 USC § 1225(b)(1)(A)(i).

Wong also argues that the INS acted outside its statutory authority in enacting the regulation pursuant to which she was detained. Wong was detained pursuant to 8 CFR § 235.3(b)(2)(iii), which provides as follows:

> Detention and parole of alien in expedited removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section *shall be detained pending determination and removal*, except that parole of such alien, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

(Emphasis added).

Wong contends that in enacting this regulation, the INS acted outside its statutory authority because Congress authorized only expedited *removal*, and not *detention*, of arriving aliens:

> **(b) Inspection of applicants for admission**
>
> **(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled**
>
> **(A) Screening**
>
> **(i) In general**
>
> If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section 1182(a)(6)(c) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

8 USC § 1225(b)(1)(A)(i).

Specifically, Wong contends that this statute authorizes only the *removal* and not the *detention* of arriving aliens who are determined to be inadmissible. As a consequence, Wong asserts that the INS exceeded its statutory authority by enacting 8 CFR § 235.3 requiring mandatory detention and, therefore, that her detention pursuant to that regulation was unlawful. The difficulty with Wong's

argument is that her false imprisonment claim turns on the contention that her detention was pursuant to an invalid regulation which falls within the ambit of the "due care" exception to the FTCA.

In *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005), *petition for cert filed*, 74 USLW 3275, October 24, 2005, No. 05-529, Welch was detained for over a year under an immigration statute that the court later determined was unconstitutional as applied to him due to its failure to provide for a bail hearing. The Fourth Circuit affirmed the dismissal of Welch's claim for false imprisonment under the "due care" exception to the FTCA, applying a two-part analysis:

> First, we determine whether the statute or regulation in question specifically proscribes a course of action for an officer to follow. Second, if a specific action is mandated, we inquire as to whether the officer exercised due care in following the dictates of the statute or regulation. If due care was exercised, sovereign immunity has not been waived.

Welch, 409 F3d at 652, citing *Crumpton v. Stone*, 59 F3d 1400, 1403 (DC Cir 1995).

Because of the mandatory language of the statute under which Welch was detained, the court found the first part of the analysis satisfied:

> The language in this provision specifically proscribes a course of action to be followed by officers of the United States. The detention . . . is mandatory; the 'shall' language in the provision indicates that an individual officer cannot deviate from its enforcement.

> Once Welch was deemed deportable, the INS officers had no discretion in their actions. The decision to detain him was statutorily required, thus satisfying the first requirement of the due care exception.

Id.

As in *Welch*, the first part of this analysis is satisfied here. On May 20, 1999, Douglas Glover, a Supervisory Immigration Inspector, and John H. O'Brien, a Port Director, issued a Determination of Inadmissibility and Order of Removal Under Section 235(b)(1) of the Act. Plaintiffs' Exhibit 8; Plaintiff's Concise Statement of Material Facts, ¶ 9. The regulation pursuant to which Wong was detained (8 CFR § 235.3(b)(2)(iii)) is couched in mandatory language, requiring the detention of aliens who have been ordered removed.

This leaves only the question of whether the officer exercised due care in following the dictates of the statute or regulation. As in *Welch*, the gravamen of Wong's false imprisonment claim and the focus of the pending motions is the alleged illegality of the decision to detain her in the first instance. Wong makes several arguments as to why the regulation should not have been applied to her, including that she was not an "arriving" alien (and therefore 8 U.S.C. § 1225(b)(1)(A)(i) did not apply to her), that she was in possession of a valid, unexpired B-2 visitor visa (and therefore had a valid entry document and was not inadmissible under 8 U.S.C. § 1182(a)(7)), and that by the time she was detained, she had filed an I-485 petition seeking adjustment to permanent resident status (and therefore was no longer an applicant for admission under 8 U.S.C.

§ 1225, but was instead an applicant for adjustment of status under 8 U.S.C. § 1255).

However, even assuming the validity of some of these arguments,[5] her false imprisonment claim cannot be salvaged. The core of that claim and these arguments is that no expedited removal order should have been entered against Wong. However, this court lacks jurisdiction to entertain such an argument. 8 U.S.C. § 1252(a)(2)(A)(i). The fact that an expedited removal order was issued against Wong, combined with a regulation which mandates detention upon issuance of such an order (even if invalid), results in Wong being unable to successfully bring a claim for false imprisonment in this court.

However, some of Wong's allegations go beyond the mere fact of her detention and instead implicate the *manner* in which she was detained. In *Welch*, the court emphasized that "[w]hen a statute requires an official to take a particular action, *the manner in which the act is undertaken may nevertheless be improper and thus performed without due care.*" *Welch*, 409 F.3d at 653 (emphasis added). In such a case, the second prong of the due care

---

[5] Defendants dispute each of these arguments on the basis that Wong had abandoned her previous applications for adjustment of status by departing without advance parole and could not enter the country on a nonimmigrant visa in order to apply for an adjustment of status. However, resolution of this dispute is unnecessary because of the jurisdictional inability of this court to hear challenges to expedited removal orders and the corresponding regulation mandating detention when such orders issue.

exception analysis is not met, and the exception to a waiver of sovereign immunity does not apply.

Wong alleges that six weeks after revoking her parole status and three weeks after issuing the expedited removal order, and fully aware of—but deliberately ignoring—her adjustment of status application, defendants induced her into coming to the INS offices by sending her a letter requesting her to appear to pick up her Employment Authorization Card. Fourth Amended Complaint, ¶¶ 12-16. When she did so, Wong was summarily given a letter denying her application for adjustment of status which misrepresented her appeal rights. She was then arrested, handcuffed, and placed in detention. *Id*, ¶ 17. Wong alleges that the INS's "bait and switch" letter and misrepresentations effectively cut off her ability to request review or appeal of the denial of her adjustment of status application. *Id*, ¶¶ 17, 19-21. The focus of the false imprisonment claim and the present motions is on the legality of the detention itself. However, these allegations appear to target conduct apart from the bare fact of the detention and instead strike at the denial of other legally protected interests by means of INS trickery.

Some of these allegations may be encompassed in Wong's negligence claim under the FTCA. However, the allegations also appear to be directed at conduct which may form the basis for torts other than negligence or false imprisonment. This court expresses no opinion on the nature or availability of any such tort, except to note that such allegations appear to fall outside the proscriptive boundaries of the due care exception to the FTCA.

Accordingly, this court concludes that the United States has not waived sovereign immunity for Wong's FTCA claim for false imprisonment. As a result, this court lacks subject matter jurisdiction over that particular tort claim. Because discovery has not closed and this court is not privy to the details of what discovery has revealed thus far, this court expresses no opinion as to what possible tort claims may or may not be supported by Wong's allegations about the manner in which the expedited removal order was executed. Instead, the door should be left open to Wong to replead and adequately frame any such claims in addition to her remaining FTCA claim for negligence.

RECOMMENDATION

For the reasons set forth above, plaintiff Kwai Fun Wong's Motion for Partial Summary Judgment Against the United States (docket #192) should be DENIED and the United States' Cross-Motion for Partial Summary Judgment on Plaintiff Kwai Fun Wong's False Imprisonment Claim (docket #206) should be GRANTED WITHOUT PREJUDICE.

Accordingly, the United States should be granted summary judgment against the portion of the Fifth Claim for Relief by Wong alleging a violation of the FTCA based on the tort of false imprisonment. However, Wong should be granted leave to replead her FTCA claim to the extent she can allege a viable tort claim outside the due care exception to the FTCA concerning the manner in which she was detained when defendants executed the expedited removal order.

SCHEDULING ORDER

Objections to this Findings and Recommendation, if any, are due March 6, 2006. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

DATED this 14th day of February, 2006.

s/ JANICE M. STEWART
JANICE M. STEWART
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG, PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE (INS), BEING SUED AS DAVID V. BEEBE, JOHN F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER AND JOHN DOE, INS OFFICIALS, ET AL., DEFENDANTS

June 25, 2002

ORDER

JONES, Judge:

Magistrate Judge Janice M. Stewart filed Findings and Recommendation (#62) on April 5, 2002, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Ma-*

chines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Defendants have timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Stewart's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Stewart's Findings and Recommendation (#62) dated April 5, 2002, in its entirety. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (#31) is DENIED, and plaintiffs are ordered to replead their claims to specify which underlying factual allegations they rely on for each of their *Bivens* claims and to replead their claim for declaratory relief.

IT IS SO ORDERED.

DATED this 25th day of June, 2002.

/s/ ROBERT E. JONES
ROBERT E. JONES
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV-01-718-ST

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION; AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID V. BEEBE; JERRY F. GARCIA; JACK O'BRIEN; DOUGLAS GLOVER; JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS; AND UNITED STATES OF AMERICA, DEFENDANTS

Apr. 5, 2002

ORDER, FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate J.

INTRODUCTION

On June 17, 1999, the United States Immigration and Naturalization Service ("INS") detained plaintiff, Kwai Fun Wong ("Wong"), at its Portland, Oregon office. Wong is a citizen of Hong Kong, the Matriarch of the Tao Heritage, and the leader of plaintiff Wu-Wei Tien Tao Association ("Association"), a non-profit organization registered in Oregon. The Association operates plaintiff

Chong Hua Sheng Mu Gong ("Sheng Gong"), a non-profit religious organization located in Houston, Texas. Wong has taken lifelong vows of vegetarianism and celibacy.

Immediately following her detention on June 17, 1999, Wong was arrested, handcuffed, and taken to the Multnomah County Detention Center ("MCDC"). Wong was imprisoned at MCDC for five days, during which time she alleges that she was twice subjected to strip searches, including orifice searches, was denied access to her attorney or her followers, and was denied vegetarian meals. On June 22, 1999, Wong was removed from the United States.

Wong, the Association, and Sheng Gong allege that defendants, the INS and various INS officials, including defendants David V. Beebe, Jerry F. Garcia, Jack O'Brien, and Douglas Glover, violated their rights under the First, Fourth, and Fifth Amendments to the United States Constitution and substantially burdened their exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 USC § 2000bb, by denying Wong advance parole prior to or after her trip to Hong Kong, improperly revoking Wong's parole after her return to the United States, improperly refusing to adjust Wong's status to that of lawful permanent resident, then detaining and arresting Wong, subjecting her to strip searches, denying her information on how to contact her attorney or her followers, denying her vegetarian meals, and summarily removing her from the United States.

The following motions are now pending in this matter: (1) Defendants' Motion to Stay Discovery Until After the Court Rules on Defendants' Motion to Dismiss (docket

20); (2) Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (docket # 31); (3) Plaintiffs' Motion to Compel (docket # 33); (4) Plaintiffs' Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs (a) are Allowed to File Their Amended Complaint; and (b) are Allowed Discovery (docket # 34); (5) Plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46); and (6) Defendants' Motion for Clarification (docket # 53).

For the reasons that follow, defendants' Motion for Clarification (docket # 53) is granted; the parties' competing motions to stay discovery (docket # 20) or to stay the pending motions to dismiss (docket # 34) are denied; plaintiffs' Amended Motion to Allow Filing of a Second Amended Complaint (docket # 46) is granted; and plaintiffs' Motion to Compel (docket # 33) is granted, subject to adoption of the following recommendation by a district court judge. This court further recommends that defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (docket # 31) should be denied.

ANALYSIS

I. *Preliminary Matters*

A. *Defendants' Motion for Clarification*

On December 13, 2001, defendants filed a Motion for Clarification (docket # 53), asking this court to clarify its minute order dated November 14, 2001 (docket # 45). That minute order grants plaintiffs' motion filed on November 9, 2001 (docket # 44), to Alter, Amend, or Correct their Motion to Allow Filing of a Second Amended Complaint. The purpose of plaintiffs' motion was simply to

amend their proposed Motion to Allow Filing of a Second Amended Complaint (and the proposed Second Amended Complaint submitted therewith) to reflect a request for attorney fees in their Fourth Claim for Relief under RFRA. However, the minute order incorrectly states that it is "Granting plaintiffs' motion to allow filing of second amended complaint," rather than granting plaintiffs' Motion to Alter, Amend, or Correct their motion to Allow Filing of a Second Amended Complaint. Accordingly, defendants' Motion for Clarification (docket # 53) is granted and the minute order will be amended.

B. *Motions to Stay*

The parties also have filed competing motions to stay. Defendants assert that discovery should be stayed until this court rules on their motion to dismiss, while plaintiffs assert that defendants' motion to dismiss should be stayed. Furthermore, plaintiffs move to compel certain discovery. As discussed in detail below, several legal issues in this case will control the future course of this litigation. Those legal issues, which are squarely presented by defendants' motion to dismiss, should be put to rest so that all parties can proceed in the most expeditious manner. Thus, plaintiffs' Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs (a) are Allowed to File Their Amended Complaint; and (b) are Allowed Discovery (docket # 34) is denied.

However, this court also grants plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46) to allow plaintiffs to add a claim under the Federal Tort Claims Act ("FTCA"), 28 USC §§ 2671-80, and recommends that defendants' Motion to Dismiss

Plaintiffs' First Amended Complaint (docket # 31) should be denied, with plaintiffs given leave to replead to specify the factual allegations underlying each of their claims. As a result, and in order that discovery in this case not be unnecessarily delayed, defendants' Motion to Stay Discovery Until After the Court Rules on Defendants' Motion to Dismiss (docket # 20) is also denied.

C. *Plaintiffs' Motion to Compel*

Plaintiffs have also filed a Motion to Compel (docket # 33), seeking responses to Request for Production Nos. 1-5 and 12-21 in Plaintiffs' First Discovery Requests. Defendants counter that no discovery should be allowed because plaintiffs' claims should be dismissed. As discussed below, this court recommends that plaintiffs be allowed to proceed with their claims. Accordingly, plaintiffs' Motion to Compel (docket # 33) is granted, subject to adoption of these Findings and Recommendations by a district court judge.

II. *Motion to Dismiss—Lack of Subject Matter Jurisdiction*

A. *Procedural Posture*

The original Complaint in this action was filed on May 18, 2001. Thereafter, on September 27, 2001, defendants filed a Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief May be Granted (docket # 14). On October 17, 2001, plaintiffs filed a First Amended Complaint (docket # 30), and defendants' Motion to Dismiss (docket # 14) was therefore deemed withdrawn. *See* Minute Order dated November 5, 2001 (docket # 41). Defendants then filed the present

Motion to Dismiss the First Amended Complaint (docket # 31), asserting that: (1) this court lacks subject matter jurisdiction; (2) plaintiffs have failed to state any claim upon which relief can be granted; and (3) even if plaintiffs' claims survive these two challenges, the individual defendants are entitled to qualified immunity. This court first addresses defendants' assertion that plaintiffs fail to allege subject matter jurisdiction.

B. *Legal Standard*

In considering FRCP 12(b)(1) motions to dismiss for lack of subject matter jurisdiction which attack the face of the complaint, as opposed to relying upon extrinsic evidence, the court must consider the allegations of the complaint as true. *Gould v. Electronics Inc. v. United States*, 220 F3d 169, 176 (3rd Cir. 2000); *Valdez v. United States*, 837 F. Supp. 1065, 1067 (ED Ca 1993), *aff'd*, 56 F3d 1177 (9th Cir1995). In addition, courts may consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir), *cert denied*, 525 U.S. 1001 (1998) (citations omitted). Dismissals under FRCP 12(b)(1) are limited to cases where the federal claim is "immaterial and made only for the purpose of obtaining federal jurisdiction" or the "claim is wholly insubstantial and frivolous." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

However, when ruling on a challenge to subject matter jurisdiction, the court is free to hear evidence regarding

jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In such cases, no presumption of truthfulness attaches to plaintiff's allegations. *Id.* Unlike a motion to dismiss for failure to state a claim under FRCP 12(b)(6), a court may consider extrinsic evidence regarding a motion to dismiss for lack of subject matter jurisdiction without converting the motion into one for summary judgment. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987).

C. *Allegations of the First Amended Complaint*

The First Amended Complaint references a number of documents, copies of which the parties have attached to various filings in support of their respective motions. Since the parties do not appear to question the authenticity of those documents, this court will consider them in ruling on the motion to dismiss for lack of subject matter jurisdiction. Additionally, while the parties have considerably different views of the legal significance of the facts of this case, defendants do not challenge the basic historical factual allegations underlying plaintiffs' claims, nor have they submitted any evidence to challenge the remaining factual allegations. Thus, this court assumes as true the following allegations of the First Amended Complaint (docket # 30):

1. *Background and Parties*

Wong is a citizen of Hong Kong and the selected Matriarch of the Tao Heritage and the leader of the Association. Wong is the heavenly mandated successor to continue the unbroken lineage of the ancient Tao Heritage.

First Amended Complaint, ¶¶ 3, 26. She first lawfully entered the United States in 1985 as a qualified Tao Minister. *Id*, ¶ 3.

The Association is a worldwide, nonprofit religious organization registered in New York, Texas, and Oregon. *Id*, ¶ 4. Sheng Gong is a nonprofit religious organization located in Houston, Texas and operated by the Association. One of the missions of Sheng Gong is the creation of a holy meeting place for all beings to receive God. *Id*, ¶ 5. The function of Tien Tao is both religious and educational. It is dedicated to the operation of the Association and the fostering of universal truth. The followers believe that Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return heaven by restoring the original nature. One of the most important missions of Tao is to propagate the truth of the immortal Tao throughout the world in order to enlighten people to their true selves and awaken their conscience so that all people can live in harmony, exercise virtue, and restore their connection with God. *Id*, ¶ 11.

At all times material herein, defendants David V. Beebe ("Beebe"), Jerry F. Garcia ("Garcia"), Jack O'Brien ("O'Brien"), Douglas Glover ("Glover"), and John Doe INS officials ("John Does") were employees of the United States and officials of the INS. *Id*, ¶ 6. At the INS's Portland office, Beebe was the District Director (*id*, ¶ 7); Garcia was Assistant District Director of Examinations (*id*, ¶ 8); O'Brien was the Port Director (*id*, ¶ 9); and Glover was a Supervisory Inspections Officer (*id*, ¶ 10).

2. *Wong's Entry Into the United States and Succession in the Tao Heritage*

In 1992, the former Leader of the Association, Fat Fan Cheung ("Qian Ren"), instructed Wong to accompany him to apply for permanent residency in the United States in order to accomplish the mission of establishing Tao in the west. The Association filed the initial immigration petition on Wong's behalf in 1992. The INS approved Wong's filing in November of 1992 and again in December of 1994. In 1993, Qian Ren appointed Wong as the inheritor of the ancient Tao Heritage. Wong resided in the United States carrying out her religious work while her petitions were pending before the INS for over six years. Wong never received notice whether her applications had been ruled upon. *Id*, ¶ 12.

3. *Wong's Succession and Departure from the United States*

On March 16, 1999, Qian Ren passed away in Houston, Texas. Upon his death, Wong became his successor in the ancient Tao Heritage and was obliged to arrange his funeral services and accompany his body back to Hong Kong for burial. In the Tao Way, it was crucial for Wong to accompany Qian Ren's body back to Hong Kong. Wong was responsible for meeting with all senior Tao ministers from the worldwide Tao arena in Hong Kong to plan the future operations of the Association in the aftermath of Qian Ren's sudden death. Wong, as the inheritor of Qian Ren and the leader of the Association, was the only person qualified and in the position to handle the funerary services of Qian Ren and the one in charge of directing the future of the worldwide organization. Under the circum-

stances, Wong was compelled to leave the United States to fulfill her religious obligations. *Id*, ¶ 13.

Because her petition for permanent residency was pending, Wong was not permitted to leave the United States without advance permission (advance parole) from the INS. Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advance parole, but was unsuccessful. Because of the state of extreme urgency and under the heavy burden of her religious obligations, Wong departed the United States on or about March 27, 1999, having not been able to obtain advance parole authorization prior to her departure. *Id*, ¶ 14.

4. *Wong's Return to the United States*

On April 13, 1999, 18 days after Wong departed the United States, she returned to the United States via San Francisco, California. When the INS officers in the San Francisco airport were informed of the reason for Wong's departure without receiving advance parole and her prior application for permanent residency, they paroled Wong into the United States and requested that she report for a deferred inspection in Portland on April 28, 1999. *Id*, ¶ 15.

On or about April 20, 1999, Wong and the Association together filed an adjustment of status application under the Immigration and Naturalization Act ("INA"), § 245(i), 8 USC § 1255(i) ("INA § 245(i)"), which was accepted by the INS's Nebraska Service Center. *Id*, ¶ 16. According to the INS's June 17, 1999 letter to Wong, she also filed an Application for Advance Parole, presumably ret-

roactively. *See* Letter from INS to Wong dated June 17, 1999 ("Denial Letter"), p. 3, a copy of which is attached as Exhibit 5 to Declaration of Counsel in Support of Plaintiffs' (1) Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs Are Allowed Discovery; and (2) Motion to Compel Discovery ("Declaration of Plaintiffs' Counsel"), filed October 29, 2001 (docket # 35).

On or about April 26, 1999, Wong's immigration attorney notified the Portland INS office that Wong had filed her adjustment of status application and notified O'Brien to contact his office if O'Brien wanted to meet with Wong in person. No one at the INS requested such a meeting, nor contacted Wong's attorney. *Id*, ¶ 17.

On or about April 29, 1999, Beebe revoked Wong's parole status. Plaintiffs allege that this revocation of parole was improper because Wong's adjustment of status application had not yet been decided. *Id*, ¶ 18.

On or about May 20, 1999, Glover and O'Brien issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility, finding Wong "inadmissible in proceedings under [the expedited removal provision.]"[1] *See* Declaration of Plaintiffs' Counsel, Exhibit 13. In doing so, plaintiffs allege that the Portland INS office and the individual defendants ignored the filing of the adjustment of status application and failed to consider Wong's

---

[1] The specific provision pursuant to which Wong was removed was INA § 235(b)(1), 8 USC § 1225(b)(1) ("INA § 235(b)(1)"). Unless otherwise specified, all references to "the expedited removal provision" are to that specific subsection.

application under the INA, § 245(i), thereby violating her constitutionally guaranteed due process rights. *Id*, ¶ 19.

5. *Wong's Detention and Removal from the United States*

On or about June 9, 1999, Beebe issued a letter requesting Wong to appear at the Portland INS office to receive her Employment Authorization Card on June 17, 1999. *Id*, ¶ 20.

Wong appeared as requested on June 17, 1999, to receive her Employment Authorization Card and was seized by INS officers. Wong was locked in a room by four INS officers and subjected to an inquisition. Wong was given a letter denying her application for the adjustment of status signed by Garcia on behalf of Beebe (the Denial Letter, referenced above). After the inquisition, Wong was arrested, handcuffed, and placed in detention. She was then taken to MCDC where she was subjected to two strip searches, including an orifice search. Wong was imprisoned for a total of five days. *Id*, ¶ 21.

Wong has made a lifetime vow of vegetarianism. Requests were made for vegetarian meals for Wong, but these requests were ignored. She lived on bread and water during her five-day detention and was unable to practice her faith. In addition, while Wong was incarcerated, she was not provided with a translator or information about her rights or how to contact her attorney or her followers. *Id*, ¶ 22.

After her arrest, Wong was not provided with a hearing before an administrative law judge, despite repeated requests by her immigration attorney. *Id*, ¶ 23. On or

about June 22, 1999, Wong was removed from the United States under protest and extreme duress. That same day, she was served with the Notice and Order of Expedited Removal, described above. *Id*, ¶ 24.

6. *Damages*

Wong, as the leader of the Association, has been denied her right to be in the United States to perform her duties which are essential to the proper functioning of the Association and Sheng Gong, which has had serious consequences for the Association and Sheng Gong. This situation has bred confusion and chaos among Tao practitioners in regions throughout the world. Also, Wong's standing as the Leader of the Association and Sheng Gong has suffered substantial harm and her mandated mission is now being challenged. The mission of Tao and the administration of the Association and Sheng Gong have been seriously jeopardized. *Id*, ¶ 26.

The faith of the members of the Association has also been shaken by Wong's unlawful arrest, detention, and removal, thereby damaging Wong's reputation, the reputation of the Association, and the reputation of Sheng Gong. Wong's sacred life was completely obstructed. She was treated like a criminal by the individual defendants. Their treatment of Wong is an insult to her human dignity and to all members of the Association and Sheng Gong. *Id*, ¶ 27.

The Association and Sheng Gong are registered religious groups in the United States and the individual defendants, by virtue of their conduct described herein, have denied the Association, Sheng Gong and its leader the right to practice their religion and to associate for that

purpose under the First and Fifth Amendments to the United States Constitution. This situation has a substantial damaging impact on both the current and the future propagation of their religious mission. *Id*, ¶ 28.

The Association and Sheng Gong have been severely damaged economically by Wong's forced absence. There has been a dramatic decrease of donation income as well as membership in the Association and Sheng Gong. The construction of Chong Hua Sheng Mu Gong (God's Home) could not be completed, which is of utmost importance to the members of the Association and Sheng Gong. *Id*, ¶ 29.

The Association and Sheng Gong also suffered non-economic damages resulting directly from the removal of Wong from the United States. Wong's removal made it necessary for the Association to restructure its worldwide operations. Wong is responsible for the entire Tao arena, including the United States, and must be consulted daily for guidance with everyday matters. Her removal caused extreme inconvenience to the Tao administration which disrupted the operations of the entire region. *id*, ¶ 30.

Many members throughout the world disassociated from the Association as a direct result of Wong's unlawful imprisonment and removal. Many members chose not to recognize Wong as the inheritor of the Tao mandate and the leader of the Association because her reputation was so severely damaged by the actions of the individual defendants. This loss of membership as a direct result of Wong's removal from the United States has caused severe hardship both economically and non-economically to the Association. *Id*, ¶ 31.

As a result of the individual defendants' conduct described above, Wong was forced to endure severe distress, humiliation and embarrassment. *Id*, ¶ 34.

7. *Plaintiffs' Claims*

Wong, the Association, and Sheng Gong allege four claims in the First Amended Complaint. Two of those claims seek damages pursuant to *Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971). The first *Bivens* claim is alleged by Wong for a violation of the Fourth and Fifth Amendments (First Claim for Relief), while the second is alleged by all plaintiffs for violation of the First and Fifth Amendments (Second Claim for Relief). Taken together and read most broadly, the First and Second Claims allege that the individual defendants violated: (1) Wong's rights to: (a) practice her religion; (b) associate with others in the practice of her religion, including members of the Association; (c) enjoy the full measure of her liberty rights under the governing immigration law; (d) be free from unreasonable searches and seizures; and (e) be provided substantive and procedural due process of law; and (2) the rights of the Association and Sheng Gong and their members to practice their religion and associate with others in the practice of their religion, including their right to associate with Wong. Specifically, plaintiffs allege that these rights were violated by defendants' acts of: (1) refusing to grant Wong advance parole or to allow her to leave without advance parole (First Amended Complaint, ¶ 14); (2) refusing to consider Wong's adjustment of status application under INA § 245(i) (*id*, ¶ 19); (3) revoking Wong's parole status without first issuing a decision concerning her request for adjustment of status under INA § 245(i) (*id*, ¶ 18); and (4)

applying the expedited removal provision to Wong while her application for adjustment of status was still outstanding (*id*, ¶ 19).

The Third Claim for Relief alleges that Wong is entitled to declaratory relief under 28 USC § 2201. Specifically, Wong alleges that she is entitled to have her application for adjustment of status ruled upon under INA § 245(i).

Finally, the Fourth Claim for Relief alleges that plaintiffs are entitled to an award of damages under RFRA because defendants' conduct substantially burdened their exercise of religion. Additionally, in their Amended Motion to Allow Filing of a Second Amended Complaint (docket # 46), plaintiffs seek to add claims under the FTCA for false imprisonment, intentional interference with economic relations, and negligence.

D. *Analysis*

Each side vehemently accuses the other of turning a shield into a sword. Plaintiffs argue that the INS has impermissibly turned the expedited removal provision into a draconian means to avoid giving any legitimate consideration to the requests for advance parole and pending applications for adjustment of status and of persecuting individuals with legitimate and longstanding ties to the United States. Defendants argue that plaintiffs, under the "guise" of a *Bivens* action, are attempting to use the generous protections afforded by the United States Constitution as a means to thwart obvious congressional intent to prevent non-citizens from "flagrantly circumvent[ing] the normal immigrant visa-issuing process abroad by the United States consul." Denial Letter, p. 3. Perhaps not

surprisingly, the truth lies somewhere in between these two extremes.

Defendants argue that the First Amended Complaint must be dismissed, and plaintiffs' motion to file a Second Amended Complaint must be denied, because this court lacks subject matter jurisdiction over plaintiffs' claims. This court clearly has federal question jurisdiction under 28 USC § 1331 over the *Bivens* and RFRA claims.[2] Additionally, as discussed below, plaintiffs' Amended Motion to File a Second Amended Complaint (docket # 46) to add claims under the Federal Tort Claims Act ("FTCA") is granted. Those claims, once added, also are well within this court's jurisdiction under 28 USC §§ 1331 and 1346(b). However, defendants contend that general federal question jurisdiction over plaintiffs' claims under 28 USC § 1331 is barred by INA § 242(a)(2)(A), (a)(2)(B), and (e)(5), 8 USC §§ 1252(a)(2)(A), (a)(2)(B), and (e)(5) ("INA § 242"),[3] and that plaintiffs' challenge of Wong's expedit-

---

[2] The Third Claim for Relief under the Declaratory Judgment Act does not provide plaintiffs with any jurisdictional leverage. *Gritchen v. Collier*, 254 F.3d 807, 811 (9th Cir. 2001) ("The Declaratory Judgement Act . . . applies only if federal jurisdiction independently exists.").

[3] The INS cites INA § 242(a)(1)(B), but there is no such section. Instead, the relevant provisions limiting judicial review provide as follows:

> "no court shall have jurisdiction to review—(i) . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [INA § 235(b)(1)]." INA § 242(a)(2)(A);

ed removal cannot be litigated by means of a *Bivens* action.

This case revolves around fundamental disagreements over the exact nature of Wong's immigration status between the time she was paroled into the United States on April 13, 1999, by INS officials in San Francisco and the time she was detained on June 17, 1999, by INS officials in Portland, and the resulting statutory or constitutional rights, if any, plaintiffs enjoyed during that time period.

Defendants characterize Wong's return to the United States from Hong Kong as an attempted "illegal" entry with no valid entry documents and strenuously assert that Wong enjoyed no constitutional rights during that critical time period. In the INS's view, the fact that Wong lived in the United States for some seven years prior to her fateful trip to Hong Kong between March 27 and April 13, 1999, is constitutionally meaningless and that Wong was, for all purposes, on equal footing with a person who had never stepped foot inside the borders of this country. Relying on the *Fleuti* doctrine,[4] plaintiffs counter that Wong's longstanding domicile in the United States excus-

---

"no court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under [section 245 of the INA,] section . . . 1255 of this title" INA § 242(a)(2)(B); and

"[i]n determining whether an alien has been ordered removed under section 1225(b)(1) . . the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner." INA § 242(e)(5).

[4] This doctrine was first enunciated in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963).

es her 18 day trip to Hong Kong. Defendants rejoin that Wong is not entitled to the benefits of the *Fleuti* doctrine and that they had unquestionable authority to detain her pending her removal from the United States. According to defendants, these two legal truisms strip this court of jurisdiction to hear any of plaintiffs' claims.

While this court agrees with defendants that *Fleuti* does not provide Wong with a safe haven, it disagrees that such a conclusion bars all of plaintiffs' claims. As discussed below, plaintiffs assert claims which do not turn on application of the *Fleuti* doctrine. Those claims are not subject to dismissal for either lack of subject matter jurisdiction or failure to state a claim. However, because the applicability of the *Fleuti* doctrine is pivotal to the future of this litigation, this court first discusses that issue, and then explains why plaintiffs' claims are, at least at this point in this litigation, not subject to dismissal.

1. *The Expedited Removal Provision*

The heart of defendants' position is that Wong was properly removed from the United States pursuant to the expedited removal provision, thus depriving this court of jurisdiction over any of plaintiffs' claims pursuant to INA § 242(a)(2)(A) and (e)(5).

In 1996, prompted by its concern that "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter,"[5] Congress substantially revised the immigration laws and enacted

---

[5] H.R. Rep No. 104-469, pt 1 at 158 (March 4, 1996).

the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). IIRIRA included the expedited removal provision and made "comprehensive amendments to the [INA], 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*" *INS v. St. Cyr*, 533 U.S. 289, 292 (2001). The expedited removal provision gives the INS broad authority to order aliens "arriving in the United States" removed if "an immigration officer determines" that the alien is "inadmissible under section . . . 1182(a)(7)." INA § 235(b)(1). An alien is inadmissible under that provision if "at the time of application for admission," the alien is not in possession of a "valid entry document . . . and a valid unexpired passport, or other suitable travel document." INA § 212(a)(7)(A)(i), 8 USC § 1182(a)(7)(A)(i) ("INA § 212").

2. *The* Fleuti *Doctrine*

Defendants assert that Wong was unquestionably subject to removal under the expedited removal provision because at the time she returned to the United States on April 13, 1999, she was not in possession of a "suitable entry document" as required under INA § 212(a)(7)(A)(i).

Wong departed the United States on March 27, 1999, without first obtaining advance parole authorization. When Wong returned to the United States via San Fransisco on April 13, 1999, INS officials paroled her into the United States and requested that she report for a deferred inspection in Portland on April 28, 1999. Wong never reported for the deferred inspection. Instead, through her attorney, she filed the April 20, 1999 adjustment of status application, and then notified the Portland INS office of that application and notified O'Brien to contact

Wong's attorney if he wanted to meet personally with Wong. Rather than contacting Wong's attorney, and before any decision was issued concerning Wong's three pending adjustment of status applications, Beebe revoked Wong's parole status on or about April 29, 1999. Then, on May 20, 1999, without notifying Wong, Glover and O'Brien issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility. Beebe then issued a letter to Wong to appear at the INS's Portland office to receive her Employment Authorization Card on June 17, 1999. When Wong appeared at the Portland INS office on June 17, 1999, she was given the Denial Letter, which purported to deny each of her three pending adjustment of status applications. She was then arrested, handcuffed, and transported to MCDC, where she was kept for five days. On June 22, 1999, Wong was served with a copy of the May 20, 1999 Notice and Order of Expedited Removal and removed from the United States.

In response to that argument, plaintiffs assert that, under the *Fleuti* doctrine, Wong was not attempting to "enter" the United States after her return from Hong Kong. The plaintiff in *Fleuti* was a Swiss national who was admitted to the United States for permanent residence in 1952 and had been continuously in the country except for a visit of "a couple hours" to Ensenada, Mexico in August 1956. In 1959, the INS sought to deport him on the ground that, at the time of his return to the country in 1956, he was within one or more of the classes of excludable aliens. Fleuti was ordered deported as an alien "afflicted with a psychopathic personality" because he was homosexual. His appeal to the Board of Immigration Appeals was dismissed and he then filed an action in fed-

eral court for declaratory relief and review of the administrative action. Declining to rule on whether the provision allowing exclusion of aliens "afflicted with a psychopathic personality" was unconstitutionally vague, the Supreme Court instead determined that Fleuti's "innocent, casual, and brief" departure in August 1956 did not constitute an "entry" within the meaning of the INA and therefore could not "subject him to the consequences of an 'entry' upon his return." *Fleuti*, 374 U.S. at 462.

Plaintiffs assert that Wong's departure, undertaken in a "state of extreme urgency and under the heavy burden of [Wong's] religious obligations," First Amended Complaint, ¶ 14, was like Fleuti's "innocent, casual, and brief" trip to Mexico, and that Wong therefore should not have been deemed to be attempting an "entry" or subjected to the consequences of an entry (namely application of the expedited removal provision against her) upon her return. This argument must be rejected for three reasons.

First, the statutory language which formed the basis for the reasoning of *Fleuti* has been amended. At the time *Fleuti* was decided, the INA used the term "entry" to denote the "coming of an alien into the United States" with the following exception:

> an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his

> presence in a foreign port or place or in an outlying possession was not voluntary.

Fleuti, 374 U.S. at 452, quoting INA § 101(a)(13), 8 USC § 1101(a)(13) as it then existed.

Interpreting this exception, the Court declared that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of [the alien's] resident alien status and therefore may not subject [the alien] to the consequences of an 'entry' upon [the alien's] return." *Id* at 462.

With the enactment of IIRIRA, Congress replaced the concept of "entry" discussed in *Fleuti* with the concept of "admission," which means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 USC § 1101(a)(13)(A). It does not further define "entry." The Board of Immigration Appeals has declared that this amendment eviscerated the *Fleuti* doctrine. *See, e.g., In Re Collado-Munoz*, 21 I & N Dec 1061 (Dec 18, 1997, *en banc*) (concluding that *Fleuti*, "with its origins in the no longer existent definition of 'entry' in the Act, does not survive the enactment of the IIRIRA as a judicial doctrine."). Thus, it is questionable whether *Fleuti* survives IIRIRA.

Second, while the Ninth Circuit has not gone so far as the BIA to declare *Fleuti* nonexistent, it has taken the position that, absent "a congressional mandate . . . the *Fleuti* doctrine applies only to lawful permanent resident aliens." *Mendoza v. INS*, 16 F.3d 335, 337 (9th Cir. 1994). Such a mandate has been found in the statutes

which expressly incorporate the language at issue in *Fleuti*. These statutes govern suspension of deportation, INA § 244, 8 USC § 1254[6] and applicants seeking legalization, INA § 245a, 8 USC § 1255a.[7] *Id* at 336-37 n3-4; *see also, Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1274 (9th Cir. 1996), *rehr'g and suggestion for rehr'g en banc denied*, 109 F3d 551 (9th Cir. 1997); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1362-63 (9th Cir. 1995). The same language has also been found in the provisions governing travel by participants in the Special Agricultural Worker program, INA § 210, 8 USC § 1160.[8] *Aguilera-Medina v. INS*, 137 F.3d 1401, 1403-04 (9th Cir. 1998). Because Wong is not

---

[6] INA § 244(b)(2), 8 USC § 1254(b)(2) (repealed in 1996), stated: "'An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . *if the absence from the United States was brief, casual and innocent* and did not meaningfully interrupt the physical presence.'" *Mendoza*, 16 F.3d at 337 n3 (emphasis in original).

[7] INA § 245a(a)(3)(B), 8 USC § 1255a(a)(3)(B), states: "An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . *by virtue of brief, casual, and innocent absences from the United States.*" (emphasis added).

[8] INA § 210(a)(4), 8 USC § 1160(a)(4), grants to "lawful temporary resident[s] . the right to travel abroad . . . in the same manner as for aliens lawfully admitted for permanent residence." In *Aguilera-Medina*, the Ninth Circuit considered the 1990 (pre-IIRIRA) departure by a lawful temporary resident and determined that Congress had extended the protections of *Fleuti* to those individuals by decreeing that "lawful temporary residents were to be treated as permanent legal residents for the purposes of travel, and that lawful permanent residents were to have the benefit of *Fleuti*." *Aguilera-Medina*, 137 F.3d at 1403.

a lawful permanent resident alien, *Fleuti* does not apply to her in the Ninth Circuit.

Finally, even assuming *Fleuti* extends to aliens such as Wong who do not yet enjoy the status of a lawful permanent resident, it is difficult to reconcile the facts of this case with a viable claim for application of the *Fleuti* doctrine. In *Fleuti*, the court listed a number of factors relevant to the determination of whether the alien intended to depart "in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence," including the length of time the alien is absent, the purpose of the visit, and "whether the alien has to procure any travel documents in order to make his trip, *since the need to obtain such items might well cause the alien to consider more fully the implications involved in leaving the country.*" *Fleuti*, 374 U.S. at 462 (emphasis added).

In this case, plaintiffs acknowledge that "[b]ecause her petition for permanent residency was pending, . . . Wong was not permitted to leave the United States without advance permission (advance parole) from the INS." First Amended Complaint, ¶ 14. According to the INS, Wong had previously filed two applications for adjustment of status in 1992 and 1994, then left the United States while those applications were pending. However, those departures and subsequent reentries were apparently undertaken prior to the enactment of IIRIRA, which considerably altered the landscape for aliens presenting themselves at the borders of the United States. Wong's apparent attempt to obtain advance parole prior to her departure, or to be granted permission to leave without it, gives rise to the inference that she fully understood the possible implications of her departure. Thus, at least this

factor identified in *Fleuti* weighs against application of that doctrine in her favor.

3. *Result of* Fleuti's *Inapplicability*

Defendants assert that since *Fleuti* is inapplicable, they automatically win because they properly applied the expedited removal provision to Wong which this court lacks jurisdiction to review. However, defendants too narrowly read plaintiffs' allegations.

Plaintiffs allege a broad range of wrongful actions by defendants prior to her removal on June 22, 1999. Because plaintiffs do not specify which of their factual allegations support each of their substantive claims, it is somewhat difficult to discern the exact nature of those claims. However, as best as can be discerned, plaintiffs allege that, as a result of the individual defendants' discrimination against them on the basis of their religious practices, beliefs, and association (First Amended Complaint, ¶ 32), or as a result of discrimination against Wong due to her race and/or national origin (*id*, ¶ 33): (1) Wong was unable to obtain advance parole authorization either prior to her departure or retroactively upon her return (*id*, ¶ 14 and Denial Letter, p. 3); (2) despite making attempts through her attorney to do so, Wong was unsuccessful at making special arrangements with the INS to leave the United States without advance parole (First Amended Complaint, ¶ 14); (3) defendants failed or refused to rule on Wong's pending adjustment of status application under INA § 245(i), and then improperly revoked her parole status (*id*, ¶¶ 16, 18); (4) Wong was taken to the MCDC where she was subjected to strip searches, denied vegetarian meals, denied a translator, and never provided

information about her rights or how to contact her attorney or her followers (*id*, ¶¶ 21-22); and (5) Wong was denied a hearing before an administrative law judge in violation of the INA and her due process rights (*id*, ¶¶ 23-25).

The First Amended Complaint alleges four claims for relief, only one of which expressly incorporates all of these allegations (First Amended Complaint, ¶ 47). However, based on plaintiffs' arguments, this court assumes that each claim incorporates all factual allegations. As discussed in more detail below, these allegations are sufficient to withstand a motion to dismiss for failure to state a claim against plaintiffs' *Bivens* and RFRA claims. Thus, defendants' arguments that this court is without subject matter jurisdiction should be rejected.

III. *Motion to Dismiss—Standing*

Defendants also argue that Wong and the Association have no standing to seek declaratory relief that the INS must rule on her adjustment of status application under INA § 245(i). According to defendants, plaintiffs suffered no "injury in fact" because the INS has already ruled on that application.

"[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations and footnote omitted). Specifically, a plaintiff must show:

> (1) she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bernhardt v. County of Los Angeles, 279 F.3d 862, 868-69 (9th Cir. 2002) (citation omitted).

Wong and the Association jointly filed the April 20, 1999 application for adjustment of status. Although the INS denied this application, Wong and the Association argue that they suffered an "injury" because defendants effectively precluded their ability to seek any reopening or reconsideration of the denial of the application by notifying Wong that there was no review, then summarily detaining, incarcerating, and removing her from the United States.

Defendants argue that Wong has no right of review. However, on a motion to dismiss, this court must accept plaintiffs' allegations as true that Wong was denied a hearing before an administrative law judge in violation of her due process rights. First Amended Complaint, ¶ 23. Thus, both Wong and the Association, as joint applicants, have standing to seek redress for that injury because they argue that defendants precluded them from pursuing their limited rights for review of the denial. That injury may be addressed by a declaration that the INS must allow them to pursue such review. Whether plaintiffs have any further right of review, as alleged in the First Amended

Complaint, is a question that may be addressed at a later date.

IV. *Motion to Dismiss—Failure to State a Claim under FRCP 12(b)(6)*

A. *Legal Standard*

A motion to dismiss under FRCP 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." *Gilligan v. Jamco Development Corp.*, 108 F3d 246, 248 (9th Cir. 199[illegible]. Normally, the review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Id.* The court, however, may consider whether conclusory allegations follow from the description of facts alleged. *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992). A court may deny leave to amend when any proposed amendment would be futile. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990), *cert denied*, 502 U.S. 921 (1991).

B. *Analysis of Substantive Claims*

1. Bivens *Claims*

As discussed above, the two *Bivens* claims allege a violation of: (1) Wong's rights under the Fourth and Fifth Amendments, including her: (a) liberty rights under the INA; (b) right to procedural due process; and (c) right to be free from unreasonable seizures and searches; and (2) all plaintiffs' rights under the First and Fifth Amendments to practice their religion and associate with others in the practice of their religion. Defendants assert that the First Claim for Relief should be dismissed because

MCDC officials, not INS officials, strip searched Wong and otherwise subjected her to unconstitutional conditions of confinement. Defendants assert that the Second Claim for Relief should be dismissed because plaintiffs enjoy no First Amendment right. Defendants also assert that, assuming plaintiffs do state cognizable claims, the individual defendants are entitled to qualified immunity against both claims.

a. *First Claim for Relief—Liability for the Conditions at MCDC*

The Fourth Amendment prohibits "unreasonable" governmental interference with "[t]he right of the people to be secure in their persons, houses, papers, and effects" and protects against "unreasonable searches and seizures." These Fourth Amendment protections apply to aliens. *See Rhoden v. United States*, 55 F.3d 428, 431-32 (9th Cir. 1995) (citing cases). Similarly, "once an alien enters the country, . . . the Due Process Clause [provides them with protection since it protects] all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted).[9]

---

[9] Defendants strenuously assert that these constitutional protections do not apply because Wong was on parole status and therefore had not made an "entry" or been "admitted" into the country during the time between her return from Hong Kong on April 13, 1999, and her removal on June 22, 1999. *See* INA § 101(a)(13)(B), 8 USC § 1101(a)(13)(B) (stating that "[a]n alien who is paroled . . . shall not be considered to have been admitted."). However, plain-

To the extent that this claim rests on allegations that officials at MCDC subjected Wong to strip searches and denied her vegetarian meals, a translator, and contact with her attorney and her followers, defendants argue that they are entitled to summary judgment because Multnomah County officials, not the individual INS officials who are defendants in this case, are responsible for the unconstitutional actions.

Plaintiffs correctly point out that the Ninth Circuit has held that liability in a *Bivens* case can be predicated on a broader range of conduct than direct personal participation in the specific unconstitutional act:

> [P]ersonal participation is not the only predicate for section 1983 liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

---

tiffs allege that defendants' first unconstitutional act took place when they denied advance parole to Wong *prior* to her fateful departure for Hong Kong. There is nothing in the record to counter the conclusion that at that time, Wong had made an "entry" and had been "admitted." Because all of plaintiffs' claims relate back to an allegedly unconstitutional act at a time when it appears that Wong was an alien who had "entered" or been "admitted," this court rejects defendants' argument that plaintiffs cannot allege any constitutional claims.

Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).[10]

Defendants rely principally on *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515 (2001), for the proposition that the individual defendants may not be held personally liable for the actions of the MCDC, an independent local entity. However, *Correctional Services Corp.* did not address the issue of whether liability against a federal official extends to anything other than direct personal participation in the alleged unconstitutional act. Instead, *Correctional Services Corp.* addressed whether a *Bivens* action would lie against private entities acting under color of federal law. *Id*, 122 S. Ct. at 519 ("Respondent now asks that we . . . confer a right of action for damages against private entities acting under color of federal law. . . . We have heretofore refused to imply new substantive liabilities under such circumstances, and we decline to do so here."). In this case, plaintiffs have alleged their *Bivens* claims only against individual federal officials, not against MCDC or any other local or federal agency. Thus, the precise issue addressed in *Correctional Services Corp.* has no bearing on this case.

With respect to the strip searches, defendants cite *United States v. Robinson*, 414 U.S. 218, 235 (1973) to argue that any search of Wong conducted at the MCDC,

---

[10] *Johnson* involved a claim pursuant to 42 USC § 1983. However, "[a]ctions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*." *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

including a strip search, was not a violation of the law. The Ninth Circuit has expressly rejected such a broad reading of *Robinson*: "In *Giles* we held that the 'full search' authorized by *Robinson* was limited to a pat-down and an examination of the arrestee's pockets, and did not extend to 'a strip search or bodily intrusion.'" *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991), quoting *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984), *cert denied*, 471 U.S. 1053 (1985). Defendants also argue that they are protected from liability because strip searches are routinely performed at the MCDC for safety and security reasons. However, that argument bolsters plaintiffs' case since well before Wong's strip and cavity search, it was clear that blanket strip search policies are unconstitutional if justified by nothing more than an arrest on suspicion of the commission of a felony or a planned confinement in the general jail population. *Id* at 1445-46 (9th Cir. 1991); *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 713-15 (9th Cir. 1989); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446-47 (9th Cir. 1989).

While defendants assert that it is "indisputable" that the individual defendants did not direct or supervise the MCDC in any manner, that assertion has not yet been tested by discovery. At this point, this court is required to accept plaintiffs' allegations as true. Plaintiffs allege that Wong was unable to practice several important tenants of her religion while incarcerated at the MCDC. As discussed in more detail below, plaintiffs allege that defendants duped Wong into coming to the INS offices by asking her to pick up her employment authorization card, then incarcerated her without providing her a copy of the Notice and Order of Expedited Removal until five days

later when they summarily removed her from the country. All of these acts allegedly were driven by defendants' discriminatory animus toward plaintiffs, their religious practices, beliefs, and associations. Plaintiffs assert that defendants knew or should have known that the constitutional violations about which she complains would result from their decision to incarcerate Wong at MCDC. Under Ninth Circuit authority, this is sufficient to withstand a motion to dismiss based on a lack of causation. *See Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997), *cert denied*, 522 U.S. 1115 (1998).

Defendants also argue that they are absolved of any liability with respect to Wong's detention by virtue of 8 CFR § 235.3(b)(2)(iii), which states that "[a]n alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal." However, the First Amended Complaint is not directed simply at the fact of the detention, but at the reasonableness of that detention and the searches that accompanied it. Plaintiffs allege that Wong was subjected to strip searches, including orifice searches, denied a translator, denied contact with her attorney and her followers, and denied vegetarian meals, none of which is authorized by 8 CFR § 235(b)(2)(iii).

Plaintiffs have sufficiently alleged a claim under the Fourth Amendment and defendants do not directly address the Fifth Amendment issues raised by the First Claim for Relief. At this juncture, this court simply finds that defendants may not escape plaintiffs' First Claim for Relief by pointing the finger at unnamed MCDC officials.

Their motion to dismiss the First Claim for Relief should be denied.

b. *Second Claim for Relief—First Amendment and Due Process*

The Second Claim for Relief alleges that defendants violated the First and Fifth Amendments by denying plaintiffs' rights to practice their religion and to associate with each other. Defendants' attack against the Second Claim for Relief is similar to their jurisdictional attack in that defendants insist that Wong attempted to enter the United States illegally and had no valid entry documents. Based on that premise, defendants conclude that the Second Claim for Relief fails to state a claim because they properly commenced removal proceedings against Wong.

Were plaintiffs simply challenging the merits of the Notice and Order of Expedited Removal, defendants would be correct that this court lacks jurisdiction to entertain plaintiffs' claims. *Li v. Eddy*, 259 F.3d 1132, 1134 (9th Cir. 2001) (noting that INA § 242(e)(5) "expressly declares that judicial review does not extend to actual admissibility"). However, the First Amended Complaint does not expressly challenge the merits of the Notice and Order of Expedited Removal, but instead seeks damages for defendants: (1) refusing to grant Wong advance parole prior to her departure or permission to leave without advance parole; (2) improperly revoking Wong's parole while her adjustment of status applications were pending; (3) denying her application under INA 245(i); (4) denying her retroactive advance parole; (5) detaining her and subjecting her to unconstitutional conditions of confinement; (6) denying her any opportunity for reopening or

reconsideration of the denial of her application for adjustment of status;[11] and finally (6) removing her from the United States. The essence of plaintiffs' claims is that by taking each of these actions, defendants violated various constitutional provisions on an improper and discriminatory basis. Consideration of plaintiffs' *Bivens*, RFRA, and FTCA claims may involve consideration of the same types of issues as would be involved in reviewing the merits of the Notice and Order of Expedited Removal (*i.e.* whether racial or religious discrimination was the impetus for the actions). However, that factual overlap does not convert plaintiffs' *Bivens*, RFRA, and FTCA claims into an impermissible challenge to the Notice and Order of Expedited Removal.

The lynchpin of defendants' arguments against plaintiffs' *Bivens* claims is that Wong's status when she returned to the United States on April 13, 1999, put her in the same position as an alien who had never lived in the United States and was seeking entry to the country for the first time. According to defendants, Wong was, for all purposes, on the same footing as the plaintiff in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In that case, a Belgium journalist and six American university professors who had invited him to speak filed an action to compel the Attorney General to grant a temporary nonimmigrant visa

---

[11] As discussed below regarding plaintiffs' claim for declaratory relief, it appears that Wong's application under INA § 245(i) was decided, but that plaintiffs may have a claim premised upon defendants' acts which denied Wong any opportunity for post-denial reopening or reconsideration.

to the journalist. The journalist had temporarily visited the United States twice before. The Court noted that the journalist, "personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id* at 762. Citing that sentence, defendants argue that Wong enjoyed no First Amendment protection relating to her admission to the United States. There are two flaws with this argument.

First, each of plaintiffs' claims traces back to defendants' allegedly discriminatory act of denying advance parole to Wong, either prior to her departure or retroactively upon her return. Had Wong not been denied advance parole on an impermissible basis, her departure would not have affected her immigration status at all. Thus, it is analytically more appropriate to consider the Second Claim for Relief from the standpoint of Wong's status at the time of the first alleged constitutional injury, namely prior to her departure to Hong Kong. There is no suggestion in the record that Wong was not "lawfully present" in this country as of the date of her departure to Hong Kong on March 27, 1999. Mere "lawful presence" in this country guarantees an alien some measure of constitutional protection and undercuts defendants' argument that Wong enjoyed no constitutional protections:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of in-

> tention to become a citizen, and they expand to those of full citizenship upon naturalization.
>
> *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950).

Second, despite defendants' characterization to the contrary, the premise of plaintiffs' Second Claim for Relief is not that the First Amendment entitled Wong to admission. Plaintiffs make no such allegation, nor can they. Such a claim, if permitted, would arguably render the entire INA meaningless since every applicant for admission to the United States could assert religious beliefs they desire to practice or opinions they wish to express. Instead, plaintiffs allege that Wong was entitled to have the INS fully and fairly consider her requests for advance parole (both before her departure and retroactively upon her return) and adjustment of status under the governing immigration statutes and regulations, and that defendants violated plaintiffs' First and Fifth Amendment rights by denying those requests and denying any opportunity to appeal those denials, on impermissible grounds. In short, plaintiffs assert that the procedures employed and substantive factors considered by defendants, namely plaintiffs' religious practices, beliefs and association, fell short of being "fundamentally fair," which defendants acknowledge as the applicable constitutional standard in immigration proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984); *Ramirez-Durazo v. INS*, 794 F.2d 491, 499-500 (9th Cir. 1986).

The central question is to what status Wong should be "'assimilated . . . for constitutional purposes.'" *Shaughnessy v. Mezei*, 345 U.S. 206, 214 (1953), quoting *Chew v. Colding*, 344 U.S. 590, 599 (1953). Unlike the

plaintiff in *Shaughnessy*, Wong did not simply depart the United States and then remain physically outside its borders for a protracted period of time. Instead, Wong alleges that she sought advance parole, or special permission to depart without it, and remained physically absent for only 18 days. Wong's claims that defendants improperly, and for discriminatory reasons, revoked her parole, denied her requests for adjustment of status, and subjected her to expedited removal are analytically identical to her claim that defendants refused to grant her advance parole prior to her departure.

Assume for the sake of argument that Wong had not left, but had instead remained here and filed a *Bivens* claim alleging that INS officials had denied her advance parole on discriminatory grounds, or had otherwise denied her statutorily or constitutionally protected rights. Defendants then would be unable to successfully argue that plaintiffs have no standing or fail to state a claim or that this court has no jurisdiction. Defendants' arguments that the expedited removal provision eliminates plaintiffs' ability to seek damages for those other violations of their constitutionally protected interests simply goes too far.

As discussed above, plaintiffs do not specify exactly which conduct they claim violated which constitutional provision. However, because this court is faced with a motion to dismiss, it must give the plaintiffs the benefit of any doubt. Plaintiffs allege that defendants' actions of revoking Wong's parole, then detaining, imprisoning, and eventually removing Wong from the country were premised upon Wong's lack of proper documents upon her return to the United States and defendants' denial of the pending adjustment of status applications. The lack of

proper documents was caused by defendants' discrimination against plaintiffs by denying advance parole or adjustment of status either because of Wong's national origin or race or because of plaintiffs' religious beliefs, practices, or associations. In short, plaintiffs have alleged that all of the individual defendants' actions have their source in defendants' refusal to grant Wong advance parole or adjustment of status because of Wong's race or national origin, or because of plaintiffs' religious practices, beliefs, or association. Such allegations clearly may form the basis for a constitutional violation for denial of a benefit:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." . . . Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Board of County Comm'rs, Wabaunsee Kansas v. Umbehr*, 518 U.S. 668, 674 (1996); *Hyland v. Wonder*, 972

F.2d 1129, 1134-36 (9th Cir1992) (discussing cases), *cert denied*, 508 U.S. 908 (1993).

For these reasons, this court concludes that the Second Claim for Relief adequately alleges a violation of the First Amendment. As with the First Claim for Relief, defendants do not directly address dismissal of the Second Claim for Relief to the extent it raises Fifth Amendment issues, other than to argue that Wong was on parole status and therefore enjoyed no constitutional protections. This court recommends rejection of that argument and therefore recommends denial of defendants' motion to dismiss the Second Claim for Relief. The issue of what relief plaintiffs ultimately will be entitled to obtain should they prevail on either their First or Second Claims for Relief is left for another day.

c. *Qualified Immunity*

The individual defendants also assert that they are entitled to qualified immunity.

> In *Saucier v. Katz*, . . . the Supreme Court clarified the two-step qualified immunity inquiry. To decide whether a defendant is protected by qualified immunity, a court must first determine whether, "[t]aken in the light most favorable to the party asserting injury, . . . the facts alleged show the officer's conduct violated a constitutional right." . . . If the plaintiff's factual allegations do add up to a violation of the plaintiff's federal rights, then the court must proceed to determine whether the right was "clearly established," *i.e.*, whether the contours of the right were already delineated with sufficient clarity to make a reasonable officer in the defendant's circum-

> stances aware that what he was doing violated the right. . . . In essence, at the first step, the inquiry is whether the facts alleged constitute a violation of the plaintiff's rights. If they do, then, at the second step, the question is whether the defendant could nonetheless have reasonably but erroneously believed that his or her conduct did not violate the plaintiff's rights.

Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001), quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Defendants assert that liability cannot be premised upon the actions they took following Wong's return to the United States, namely revoking her parole, detaining her, and then removing her from the United States, because defendants were relying on statutes and regulations permitting those actions. However, blind reliance on a statute or ordinance does not always protect a government official from liability. As explained by the Ninth Circuit:

> As with most legal matters, there are no absolutes here. On the one hand, an officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. On the other, as historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. Similarly, an officer who unlawfully

> enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity even if there is no clear case law declaring the ordinance or the officer's particular conduct unconstitutional. In the end, however, an officer who reasonably relies on the legislature's determination that a statute is constitutional should be shielded from personal liability.

Grossman v. City of Portland, 33 F3d 1200, 1209 (9th Cir. 1994) (citations and footnote omitted).

Put another way, "qualified immunity is not available if, 'in light of pre-existing law,' the unlawfulness of the officer's conduct was 'apparent.'" *Pierce v. Multnomah County*, 76 F3d 1032, 1037 (9th Cir), *cert denied*, 519 U.S. 1006 (1996), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

With respect to the first step of the qualified immunity analysis, the allegations viewed in the light most favorable to plaintiffs reveal that they have alleged colorable constitutional claims, as discussed above. With respect to the second step of the qualified immunity analysis, assuming that defendants denied advance parole to Wong on the basis that she was of a race or national origin, or the leader of a religious organization that defendants abhor, defendants simply could not "have reasonably but erroneously believed that [their] conduct did not violate the plaintiff's rights." *Devereaux*, 263 F3d at 1074. Thus, defendants are not entitled to qualified immunity.

2. *RFRA—Fourth Claim for Relief*

Defendants also assert that plaintiffs' Fourth Claim for Relief under RFRA must be dismissed for failure to state a claim.

RFRA is premised upon congressional findings that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that "governments should not substantially burden religious exercise without compelling justification." 42 USC § 2000bb(a)(2) and (3). The express purpose of RFRA is to "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 USC § 2000bb(a)(3) and (b)(2). "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a(2) sincere (3) exercise of religion. *Kikamura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (citations omitted). Under RFRA, "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law)." 42 USC § 2000bb-2.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court recognized the "sweeping" nature of RFRA's coverage and noted that its provisions work to prohibit "official actions of almost every description and regardless of subject matter," and that those restrictions "apply to every agency and official" of the federal government, and to "all federal . . . law, statutory or otherwise." *Id* at 532. The Court concluded that, under RFRA, "[a]ny law is subject to challenge at any time by

any individual who alleges a substantial burden on his or her free exercise of religion." *Id.*

In this case, plaintiffs allege that the individual defendants discriminated against them because of their religious practices, beliefs, and association. They also allege that defendants' actions substantially burdened their exercise of religion. Given that the only issue presently before this court is whether plaintiffs' pleadings can survive a motion to dismiss, this court is required to construe all the allegations in plaintiffs' favor.

Defendants argue that RFRA may not be used to challenge a regulation, citing *Anderson v. Angelone*, 123 F.3d 1197, 1198 n.2 (9th Cir. 1997). However, *Anderson* involved a challenge to a state prison regulation by way of a RFRA claim brought against only state actors. The Ninth Circuit has held that the Supreme Court "invalidated RFRA only as applied to state and local law." *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000), *cert denied*, 532 U.S. 958 (2001), citing *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 832 (9th Cir. 1999). In *Anderson*, the Ninth Circuit merely recognized that, in light of *Boerne*, it did not need to consider plaintiff's RFRA claim because it challenged a state prison regulation being enforced by state actors at a state prison. Here plaintiffs' RFRA claim is against federal actors enforcing federal law.

Defendants also argue that plaintiffs' Fourth Claim for Relief under RFRA fails to state a claim because plaintiffs fail to allege that vegetarian meals are a required tenent of Wong's faith and therefore no link exists between her

dietary habits and any violation of RFRA. However, plaintiffs allege that Wong "has made a lifetime vow of vegetarianism," that defendants' failure to accommodate her vegetarian diet "interfer[ed] with the practice of [Wong's] faith," and that defendants' actions "substantially burdened plaintiffs' exercise of religion." First Amended Complaint, ¶¶ 22, 47. Given these allegations, defendants' assertion is not well taken.

Defendants also argue that plaintiffs' RFRA claim is without merit because Wong's religious exercise could not have been "substantially" burdened as required by 42 USC § 2000bb-1(a) by only five days of detention. Furthermore, defendants assert that it was local, not federal, officials who allegedly subjected Wong to strip searches and impermissible conditions of confinement. As discussed above with regard to plaintiffs' *Bivens* claims, federal officials may be subject to liability for setting into motion a series of acts by others which lead to constitutional violations. While the parties did not specifically brief this issue as it pertains to the RFRA claim, the same logic applies.

Moreover, this court does not read plaintiffs' RFRA claim as simply objecting to the fact that Wong was incarcerated for five days.[12] Again, this court is somewhat disadvantaged by the fact that the RFRA claim simply incorporates the factual allegations that precede it. However, plaintiffs' allegations appear to be aimed not only at

---

[12] Even if that were Wong's only allegation, defendants have not cited any authority for the proposition that a particular detention period is legally insufficient under RFRA.

the fact and conditions of Wong's incarceration, but also at defendants' actions, which in effect forced Wong to either forego her religious obligation to accompany Qian Ren's body back to Hong Kong or to abandon her pending application for adjustment of status.

An adherent's free exercise of his or her religion is substantially burdened by a statute that either (1) requires the adherent to refrain from engaging in a practice important to his or her religion . . . or (2) forces the adherent to choose between following a particular religious practice or accepting the statute's benefits. . . . More fully explained, the latter type of substantial burden occurs where non-adherence to a religious practice is necessary to obtain a statute's benefits; such a statute has an indirect coercive effect on the religious adherent's free exercise.

In re Hodge, 220 BR 386, 390 (DC Idaho), citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140-41 (1987); *Thomas v. Indiana Employment Sec. Div.*, 450 U.S. 707, 717-19 (1981); and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Thus, even if the short period of Wong's detention precludes a claim that her detention violated RFRA, her RFRA claim would nonetheless withstand a motion to dismiss based on plaintiffs' other allegations.

Finally, defendants also argue that they are entitled to qualified immunity from plaintiffs' RFRA claims. However, they premise that argument on the incorrect assertion that plaintiffs fail to allege that defendants actions were prompted by religious discrimination. Because plaintiffs do make that allegation, *see* First Amended Complaint, ¶¶ 32 & 47, this argument also fails.

3. *Declaratory Relief—Third Claim for Relief*

Plaintiffs seek a declaration requiring the INS to rule on Wong's adjustment of status application under INA § 245(i). This statute allows an alien who is "physically present in the United States" who "entered the United States without inspection" and who is the beneficiary of "a petition for classification under [8 USC § 1154] that was filed with the Attorney General on or before January 14, 1998"[13] to apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. *Id.* Plaintiffs assert that Wong "entered without inspection," had an adjustment of status application pending, and had prior applications for special immigrant status and the organization's initial approval as a bona fide religious group

Plaintiffs argue that defendants failed or refused to make a decision on her application under INA § 245(i), allege that "Wong is entitled to have her application for adjustment of status ruled on under the INA, Section 245(i)," and seek a "judgment against the United States declaring that the INS must rule on [Wong's] application for adjustment of status under the INA, Section 245(i)." First Amended Complaint, ¶¶ 44-45. The record in this case does not support plaintiffs' contention that no decision has yet been made under INA § 245(i). Therefore her request for declaratory relief, as presently pled,

---

[13] The deadline for this filing was amended in 2000 to provide that the petition must have been filed by April 30, 2001. *See* INA § 245(i)(1)(B)(i) (2002), as amended by Pub. L. 106-554, § 1(a)(4) [Div. B, Title XV, § 1502(a)(1)(B)].

should be dismissed. However, as discussed below, this court finds that Wong should be granted leave to replead her Third Claim for Relief to seek a declaration that defendants are required to allow plaintiffs to pursue a request for reopening or reconsideration.

Under the INA § 245(i)(1), two classes of aliens are allowed to apply for adjustment of status, namely aliens who either (i) "entered the United States without inspection" or (ii) are "within one of the classes enumerated in subsection (c) of this section." INA § 245(i)(1)(A)(i) and (ii). The Denial Letter only partially addresses Wong's eligibility under INA § 245(i). It states that "Section 245(i) provides relief for those classes of aliens listed as ineligible to adjust status in Section 245(c)." Denial Letter, p. 2. It then states that "At the time your latest Form I-485 was filed, you were still in parole status and thus not subject to the provisions of Section 245(c) of the Act. Therefore, your application will be considered under Section 245(a) of the Act." *Id.* Thus, it does not reach the merits of Wong's application under subsection (1)(A)(ii).

The Denial Letter is silent about whether Wong is entitled to relief as an alien who "entered without inspection," leading inexorably to the conclusion that the INS did not believe that subsection (1)(A)(i) even applied. The parties debate whether or not Wong in fact "entered without inspection," but this court need not decide that issue at this juncture.

The Denial Letter makes clear that the INS made a decision under INA § 245(i), namely that it did not apply because Wong had not "entered without inspection" as required under subsection (1)(A)(i) and because Wong was

on parole status and not subject to INA § 245(c) as required under subsection (1)(A)(ii). Because the declaratory relief Wong seeks has already been granted, the Third Claim for Relief, as presently pled, should be dismissed.

However, the briefing submitted by the parties reveals that plaintiffs also assert that defendants denied Wong the opportunity to receive full and fair consideration of her application for adjustment of status by refusing to reach the merits of her application under INA § 245(i), and prevented plaintiffs from pursuing any of their post-decision rights by summarily arresting, imprisoning, and then removing Wong from the United States.

Just as it is clear that the INS in fact ruled on Wong's adjustment of status application under INA § 245(i), it is also clear that the INS did not reach the merits of the adjustment of status application under that provision. Instead, its conclusion is based on the facts that Wong had abandoned her two earlier applications and that there were no "intervening equities" allowing her to "avoid" the "visa issuing functions of consuls abroad." Denial Letter, p. 3.

In their briefing on the present motions, plaintiffs assert that defendants effectively (and unconstitutionally) cut off any post-denial rights Wong or the Association may have enjoyed by representing that there were no such rights, by detaining Wong, and by removing Wong from the country. Plaintiffs correctly point out that Wong and the Association had the right to ask for reopening or reconsideration of the denial of the adjustment of status application under 8 CFR § 103.5. However, such a re-

quest must be submitted in writing on a particular form, accompanied by a nonrefundable fee, and submitted to the office maintaining the record upon which the unfavorable decision was made. 8 CFR § 103.5(a)(i)-(iii). Had Wong or the Association been able to pursue a request for reopening or reconsideration, they would have been able to argue that the decision was incorrect, based upon an incorrect application of law or Service policy and on the evidence of record at the time of the initial decision. *See* 8 CFR 103.5(a)(3). They would have been able to raise the same issues they now raise, including the issue of whether the application should have been considered under subsection (1)(A)(i) because Wong "entered without inspection." They also would have been able to raise any other issues regarding whether they were entitled to have Wong's status adjusted and, if so, whether such an adjustment should have been granted. They could have raised the issue that there were in fact "intervening equities" supporting the request for adjustment of status and challenged the assertions in the Denial Letter that Wong had "displayed a significant pattern of misconduct" and "flagrantly circumvented the normal immigrant visa-issuing process abroad by the United States consul." Denial Letter, p. 2. However, plaintiffs allege that defendants deliberately and improperly short-circuited that process.

The last sentence of the denial letter states "please note that the decisions in this case are not subject to review given your final order of removal pursuant to Section 235(b)(1) of the Act, as amended." Denial Letter, p. 3. Plaintiffs allege that Wong was handed the Denial Letter and then summarily arrested and hauled off to MCDC.

Given the express representation that the decision on the application for adjustment of status was "not subject to review," and plaintiffs' allegations that Wong was rendered unable to contact her followers or her attorney during her five day stint in MCDC at defendants' direction, Wong and the Association have a potential claim that defendants denied them the opportunity to request reopening or reconsideration under 8 CFR § 103.5(a).

Plaintiffs' allegations are coupled with the allegation that defendants were driven by discriminatory animus. As discussed above, defendants' efforts to pigeonhole Wong for all purposes into the same category as aliens arriving for the first time on the shores of the United States is unavailing. The fact that defendants went to the time and effort of writing a three page letter denying each of the three pending adjustment of status applications is mute testimony to the fact that defendants were not free to simply ignore those applications and hastily remove Wong under the expedited removal provision. Additionally, plaintiffs allege that Wong was not provided with a copy of the Notice and Order of Expedited Removal until June 22, 1999, the day she was removed from the country. The Denial Letter cites the "final order of removal" as authority for the statement that the denial of the adjustment of status application is "not subject to review." Denial Letter, p. 3. Assuming, as this court must for purposes of these motions, the truth of the allegation that Wong had not yet been served with the Notice and Order of Expedited Removal, it is difficult to understand how that order could be in any sense "final." Under the INS's own regulations, removal proceedings do not "commence"

until "issuance *and service*" of the Notice and Order of Expedited Removal. *See* 8 CFR 245.1(c)(9)(i)(E).

At this juncture, this court need not delve into the merits of plaintiffs' claims. The limited issue is whether the Third Claim for Relief is subject to dismisssal. This court finds that it is, but that plaintiffs should be granted leave to replead to seek declaratory relief that defendants are required to allow plaintiffs to pursue a request for reopening or reconsideration.

V. *Motion to Allow Filing of Second Amended Complaint*

Finally, in their Amended Motion to Allow Filing of Second Amended Complaint (docket # 46), plaintiffs seek leave to amend to add a claim under the Federal Tort Claims Act ("FTCA") and a request for attorney fees under RFRA. Defendants have not opposed the request to add a claim for attorney fees under RFRA, but do oppose the request to add a claim against the United States under the FTCA on the grounds that such an amendment is futile. Defendants assert that plaintiffs are up against a jurisdictional bar because they failed to exhaust their administrative remedies as required by 28 USC § 2675(a). Defendants' argument is not well taken.

Plaintiffs' First Amended Complaint did not allege any claim for damages under the FTCA, nor did it allege jurisdiction under the FTCA's jurisdictional provision, 28 USC § 1346(b). Instead, plaintiffs First Amended Complaint alleged two *Bivens* claims, a request for declaratory relief, and a claim under RFRA, and asserted general federal jurisdiction under 28 USC § 1331, and the Declaratory Relief Act, 28 USC § 2201. In their original pro-

posed Second Amended Complaint, submitted along with their original Motion to Amend (docket # 44), filed on November 9, 2001, plaintiffs for the first time sought to add a claim under the FTCA and alleged jurisdiction under 28 USC § 1346(b). Their amended proposed Second Amended Complaint, filed along with their Amended Motion to Allow Filing of Second Amended Complaint, on November 14, 2001 (docket # 46) also included these additions.

Unlike the cases cited by defendants, the FTCA claim involved here has not yet been added and thus is not yet before this court, except to the degree that plaintiffs now seek to add that claim. Plaintiffs are not seeking to "cure [a] jurisdictional deficiency created by the premature filing of the original complaint." *Duplan v. Harper*, 188 F.3d 1195, 1200 (10th Cir. 1999).

Defendants make much out of the fact that the only claim alleged against the United States in the First Amended Complaint was a claim for declaratory relief, which in and of itself does not provide an independent basis for jurisdiction. *See* footnote 4, *supra*. They then point out that, when they challenged plaintiffs' declaratory relief claim on that basis, plaintiffs objected to dismissing the United States as a defendant on the ground that plaintiffs intended to file an FTCA claim against the United States upon exhaustion of their administrative remedies. Defendants reason that naming the United States as a defendant without asserting any other basis for jurisdiction other than an intention to file an FTCA claim against the United States was tantamount to filing an FTCA claim against the United States. However, the fact that the United States may have had a shot at knocking out plain-

tiffs' claim for declaratory relief on legal grounds does not thereby render plaintiffs' act of naming the United States as a defendant the same as instituting an FTCA claim against the United States. The fact remains that no FTCA claim has yet been alleged, nor have plaintiffs yet alleged jurisdiction under 28 USC § 1346(b). In short, their act of seeking leave to add a claim under the FTCA following exhaustion of their administrative process is more "properly construed as instituting a new action against the government" over which this court has jurisdiction due to plaintiffs' exhaustion of their administrative remedies. *Duplan*, 188 F.3d at 1200.

At least at this point, defendants have not raised any other challenge to plaintiffs' Fifth Claim for Relief. Thus, this court reserves for another day all remaining issues related to that claim.

Thus, plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46) should be granted to allow plaintiffs to add their Fifth Claim for Relief under the FTCA, and to add a request for attorney fees to their Fourth Claim for Relief under RFRA.[14]

---

[14] As discussed above, this court recommends that plaintiffs replead their *Bivens* claims to specify the exact conduct which supports those two claims, and recommends that plaintiffs' Third Claim for Relief be dismissed, with leave granted for plaintiffs to replead that claim to seek declaratory relief that Wong be allowed to pursue a motion to reopen or reconsider the denial of her applications for adjustment of status. Thus, assuming that these recommendations are adopted by a district court judge, the amended proposed Second

ORDER

For the reasons stated above:

Defendants' Motion to Stay Discovery Until After the Court Rules on Defendants' Motion to Dismiss (docket # 20) is DENIED;

Plaintiffs' Motion to Compel (docket # 33) is GRANTED, subject to adoption of these Findings and Recommendations by a district court judge;

Plaintiffs' Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs (a) are Allowed to File Their Amended Complaint; and (b) are Allowed Discovery (docket # 34) is DENIED;

Plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket # 46) is GRANTED; and

Defendants' Motion for Clarification (docket # 53) is GRANTED, and this court's minute order dated November 14, 2001 (docket # 45) is amended by replacing the last sentence of that minute order with the following sentence: "Order-Granting Plaintiff's Motion to Alter, Amend, or Correct their Motion to Allow Filing of Second Amended Complaint (Related Document # 44)" to clarify that plaintiffs were not given leave to file their Second Amended Complaint.

Amended Complaint must be revised in accordance with this court's rulings.

RECOMMENDATIONS

In addition, for the reasons stated above, defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (docket # 31) should be DENIED, and plaintiffs should be ordered to replead their claims to specify which underlying factual allegations they rely on for each of their *Bivens* claims and to replead their claim for delaratory relief.

SCHEDULING ORDER

Objections to these Findings and Recommendations, if any, are due April 26, 2002. If no objections are filed, then the Findings and Recommendations will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than May 13, 2002. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will be referred to a district court judge and go under advisement.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35426
D.C. No. CV-01-00718-ST

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION,
PLAINTIFFS-APPELLEES

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted Mar. 3, 2009
Submission Withdrawn Mar. 4, 2009
Resubmitted May 24, 2010
Filed June 4, 2010

MEMORANDUM*

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: GRABER, FISHER and M. SMITH, Circuit Judges.

Kwai Fun Wong filed this 42 U.S.C. § 1983 action alleging that David V. Beebe, former director of the Portland, Oregon, district office of the Immigration and Naturalization Service, violated her Fourth Amendment rights. In 1999, Wong was detained for five days in Multnomah County jails pending her removal from the United States. During her detention she was subjected to two strip searches, allegedly in the presence of men. Beebe appeals the district court's denial of his motion for summary judgment seeking qualified immunity. In light of the recent en banc decision in *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010), we reverse.

In *Bull*, we upheld a county's blanket policy requiring strip searches of all arrestees classified for housing in the general jail population. *Id.* at 982. Although Wong was searched under a similar policy, she argues that her searches were unconstitutional because she was an immigration detainee rather than a domestic criminal arrestee and because she was searched not only upon her introduction to the general jail population but also upon her transfer between secure jail facilities. We need not decide whether the searches were unconstitutional, however, because even assuming a constitutional violation, Beebe is entitled to summary judgment because the right to be free from strip searches under those circumstances was not "clearly established" in 1999. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Bull*, 595 F.3d at 978 n.14 (upholding a blanket strip search policy covering not only dangerous detainees but also "persons with no criminal

history arrested for trivial offenses," who "pose no credible risk of smuggling contraband into jails" (internal quotation marks omitted)); *Bell v. Wolfish*, 441 U.S. 520, 524 (1979) (upholding a blanket strip search policy covering witnesses in protective custody and persons incarcerated for civil contempt).

Wong also alleges that she was searched in the presence of men, in violation of the county's written policy. If true, the searches may have been unconstitutional. *See Bull*, 595 F.3d at 967. Wong has not produced any evidence, however, suggesting that Beebe knew or should have known that she would be searched in the presence of men. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 966-67 (9th Cir. 2004). Beebe is therefore entitled to qualified immunity. And Wong has not named as a defendant anyone who performed or authorized such a search.

The parties shall bear their own costs of appeal.

REVERSED and **REMANDED**.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35727

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA IMMIGRATION AND NATURALIZATION SERVICE, BEING SUED AS DAVID V. BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER AND JOHN DOE INS OFFICIALS; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the District of Oregon

D.C. No. CV-01-00718-REJ(JMS)

Argued and Submitted: July 10, 2003
Filed: June 25, 2004

Before: GOODWIN, HUG, and BERZON, Circuit Judges.

BERZON, Circuit Judge:

This appeal presents a set of thorny procedural and substantive questions implicating several areas of constitutional and immigration law. These questions include:

the scope of some of the jurisdiction-stripping provisions of the Immigration and Nationality Act (INA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[1]; the boundaries of the constitutional protections afforded certain aliens returning from abroad; and the availability of a qualified immunity defense to federal officials facing Religious Freedom Restoration Act (RFRA)[2] claims. Yet, as this is an appeal from a denial of a motion to dismiss on grounds largely of qualified immunity, we are asked to decide these weighty questions aided only by the skeletal —at best—factual picture sketched out in the complaint.

The confluence of two well-intentioned doctrines, notice pleading and qualified immunity, give rise to this exercise in legal decisionmaking based on facts both hypothetical and vague. On one hand, the federal courts may not dismiss a complaint unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (citation and internal quotation marks omitted). All that is required is a "short and plain statement" of the plaintiff's claims. Fed. R. Civ. P. 8(a)(2); *see also Swierkiewicz*, 534 U.S. at 512, 122 S. Ct. 992 (citing Fed. R. Civ. P. 8(a)(2)). On the other hand, government officials are entitled to raise the qualified immunity defense immediately, on a motion to dismiss the complaint, to protect against the burdens of discovery and other

---

[1] Pub. L. No. 104-208, 110 Stat. 3009-546.

[2] 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

pre-trial procedures. *Behrens v. Pelletier*, 516 U.S. 299, 308, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The qualified immunity issue, in turn, cannot be resolved without first deciding the scope of the constitutional rights at stake. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The unintended consequence of this confluence of procedural doctrines is that the courts may be called upon to decide far-reaching constitutional questions on a nonexistent factual record, even where, as the government defendants contend and as may be the case here, discovery would readily reveal the plaintiff's claims to be factually baseless.

We are therefore moved at the outset to suggest that while government officials have the right, for well-developed policy reasons, *see Mitchell v. Forsyth*, 472 U.S. 511, 525-27, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), to raise and immediately appeal the qualified immunity defense on a motion to dismiss, the exercise of that authority is not a wise choice in every case. The ill-considered filing of a qualified immunity appeal on the pleadings alone can lead not only to a waste of scarce public and judicial resources, but to the development of legal doctrine that has lost its moorings in the empirical world, and that might never need to be determined were the case permitted to proceed, at least to the summary judgment stage. *Cf. Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 575, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947) (discussing the difficulties in deciding constitutional questions presented in "highly abstract form").

The government officials in this case having appealed despite these considerations, we now turn to the questions

they raise, after first recounting the rather sketchy facts we must presume true in this litigation.

I. BACKGROUND

A. Factual Background

According to the operative complaint:[3]

Kwai Fun Wong, a citizen of Hong Kong, first lawfully entered the United States in 1985 as a Tao minister. She later became the head of the Wu-Wei Tien Tao Association (hereinafter "Tien Tao") and, according to the belief of her religion, the "heavenly mandated" Matriarch of the Tao Heritage. Tien Tao is a religious organization dedicated to spreading the truth of Tao throughout the world. Followers of Tao believe that "Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return [to] heaven by restoring the original nature."

In 1992, Wong's predecessor as leader of Tien Tao, Qian Ren, instructed Wong to apply for permanent residence in the United States so she would be able to pursue

---

[3] All factual allegations are derived from the first amended complaint, the complaint considered by the district court in the decision we review on appeal. After the notice of appeal was filed, appellees filed a second amended complaint, but the government has filed an opposition to the filing of the second amended complaint in the district court. That opposition is still outstanding, as all proceedings in the district court were stayed pending this appeal. We therefore rely exclusively upon the first amended complaint, and do not address whether the allegations Wong seeks to add would support a contrary result. Instead, we leave that question for consideration on remand should the district court permit the filing of the second amended complaint.

Tien Tao's religious mission. Wong filed two petitions with the Immigration and Naturalization Service (INS)[4] for permanent residence, in 1992 and 1994, and resided in the United States while the petitions were pending.[5]

When Qian Ren passed away on March 16, 1999, Wong became the head of Tien Tao. To fulfill her religious duties, including arranging the funerary services and meeting with Tao ministers in Hong Kong to plan Tien Tao's future, Wong had to accompany Qian Ren's body back to Hong Kong for burial.

Under 8 C.F.R. § 245.2(a)(4)(ii), an alien with a pending application for adjustment of status is considered to have abandoned her application if she leaves the country without first obtaining permission ("advance parole") from the INS.[6] Prior to her departure for Hong Kong, Wong's

---

[4] Under the Department of Homeland Security Reorganization Plan, the INS was abolished effective March 1, 2003 and its functions transferred to the newly formed Department of Homeland Security. *See* 6 U.S.C. § 542. As the agency was known as the INS at all times pertinent to this appeal, we so refer to it in this opinion.

[5] Wong's immigration status during the pendency of these petitions is not explained in her complaint. The complaint does allege, however, that Wong's original entry into the United States was lawful, and there is nothing in the complaint to suggest that Wong's presence in the U.S. immediately prior to her departure for Hong Kong was anything but legal.

[6] At the pertinent time, the regulation provided:

> [T]he departure of an applicant [for adjustment of status] who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, unless the applicant was pre-

immigration attorney attempted unsuccessfully to make arrangements with the INS to permit Wong to leave without advance parole.[7] Eleven days after Qian Ren's death, Wong left for Hong Kong without having obtained advance parole or any special dispensation waiving the advance parole requirement.

Wong returned to the United States via San Francisco eighteen days later. Upon her arrival, INS officers paroled her into the country pending a deferred inspection in Portland on April 28.[8]

Soon thereafter, Wong and Tien Tao filed another adjustment of status application under INA § 245(i) on Wong's behalf. Wong's attorney notified the Portland INS office of Wong's application and asked Defendant-Appellant Jack O'Brien, port director of that office, to contact him if he wished to meet with Wong in person. Wong did not appear for her deferred inspection on April 28, for reasons not explained in the complaint.

The next day, April 29, Defendant-Appellant David V. Beebe, district director of the Portland INS office, re-

---

viously granted advance parole by the Service for such absences, and was inspected upon returning to the United States.

8 C.F.R. § 245.2(a)(4)(ii)(A) (1999).

[7] The complaint does not explain whether Wong sought advance parole before seeking a waiver of the advance parole requirement and if not, why not.

[8] A temporary parolee is considered not to have gained admission to the United States. *See* 8 U.S.C. § 1182(d)(5)(A) ("[P]arole of [any alien applying for admission to the U.S.] alien shall not be regarded as an admission of the alien. . . .").

voked Wong's parole. Shortly afterward, O'Brien and Defendant-Appellant Douglas Glover, a supervisory inspections officer with the Portland office, issued a "Notice and Order of Expedited Removal" and a determination of inadmissibility. Wong did not receive this Notice until June 22, 1999, the day she was removed from the country.

In early June, Wong received a letter from Beebe requesting that Wong appear at the Portland INS office on June 17 to receive her employment authorization card. When Wong presented herself, she was seized by INS officers and handed a letter denying her application for adjustment of status, signed by Defendant-Appellant Jerry F. Garcia on behalf of Beebe. After questioning, Wong was placed in detention, where she remained for five days.

At the Multnomah County Detention Center, Wong was subjected to two strip searches, including an orifice search. Wong's requests for vegetarian meals were denied, "interfering with the practice of her faith." During detention Wong was not permitted access to a translator, information about her rights, information about how to contact her attorney, or access to her followers. Despite repeated requests by her attorney, Wong was not accorded a hearing regarding her exclusion from the United States.

Wong was removed from the United States on June 22, 1999, and remains outside the country.

B. Claims and Procedural History

Wong and Tien Tao brought this damages action against the INS officials[9] for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and against the INS officials and the United States for violations of RFRA.[10] Wong and Tien Tao claim that: (1) the INS officials violated their rights under the First and Fifth Amendments to practice their religion and associate with others in the practice of their religion; and (2) the INS officials and the United States substantially burdened their exercise of religion in violation of RFRA. Wong also challenges her treatment while in INS detention, contending that the INS officials violated her right under the Fourth and Fifth Amendments to be free of unreasonable searches and seizures and her rights to liberty, due process, and equal protection of the laws under the Fifth Amendment.

Although the factual predicate for some of these claims is unclear, the first amended complaint, construed broadly, challenges on constitutional and RFRA grounds the following alleged actions of the INS officers: refusing to grant Wong permission to depart the United States to fulfill her religious obligations; revoking her parole status without first deciding her new adjustment of status petition; failing during her detention to provide her with a

---

[9] We refer to the individual Defendant-Appellants collectively as "INS officials."

[10] Wong and Tien Tao also assert additional claims not at issue in this appeal.

translator, information about her rights, information about how to contact her attorney, and access to her followers; subjecting Wong to strip searches; interfering with Wong's practice of her faith through denial of vegetarian meals while in detention; excluding Wong from the United States and interfering with her duties as a religious leader; discriminating against Wong and Tien Tao on the basis of their religious practices, beliefs, and association; and discriminating against Wong on the basis of her race and/or national origin.

The INS officials and the United States filed a motion to dismiss for lack of subject matter jurisdiction, failure to state a claim, and qualified immunity. After a thorough and careful analysis, the magistrate judge recommended the denial of the motion to dismiss in a report of her findings and recommendations, which was adopted in full by the district court.

II. APPELLATE JURISDICTION

The threshold question is whether we have appellate jurisdiction. No doubt we do over the qualified immunity issue. A district court's denial of a motion to grant qualified immunity is an appealable final decision within the meaning of 28 U.S.C. § 1291 to the extent that it turns on a question of law. *Behrens*, 516 U.S. at 306-07, 116 S. Ct. 834; *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001). Even where controverted issues of material fact remain, an appellate court may review "'abstract issue[s] of law' relating to qualified immunity," taking the facts in the light most favorable to the plaintiff. *Behrens*, 516 U.S. at 313, 116 S. Ct. 834 (citation omitted).

But the government[11] raises several additional issues not ordinarily reviewable on interlocutory appeal. We may exercise "pendent" appellate jurisdiction over an otherwise nonappealable ruling if the ruling is "inextricably intertwined" with a claim properly before us on interlocutory appeal. *See Cunningham v. Gates*, 229 F.3d 1271, 1284-85 (9th Cir. 2000); *cf. Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (holding that two district court decisions were not inextricably intertwined because they turned on different issues of law). Two issues are "inextricably intertwined" if they are "(a) [] so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Cunningham*, 229 F.3d at 1285 (citations omitted). Applying these standards to consider the reviewability of each of the issues other than qualified immunity raised by one or more defendants, we conclude that some qualify as pendent issues but others do not.

A. Subject Matter Jurisdiction

The government argues that 8 U.S.C. § 1252 bars judicial review of the actions challenged by Wong,[12] and the district court therefore lacks jurisdiction over this case.

---

[11] We refer to the individual INS officials and the United States collectively as "the government," except where necessary to distinguish between the two.

[12] Except when the distinction between the two appellees matters, we refer to both as "Wong."

Ordinarily, though, denial of a motion to dismiss based on lack of jurisdiction is not immediately reviewable. *Catlin v. United States*, 324 U.S. 229, 236, 65 S. Ct. 631, 89 L. Ed. 911 (1945). Nor is the subject matter jurisdiction question "inextricably intertwined" with the qualified immunity issue. Instead, the court must apply entirely different legal standards to resolve each issue.

We have, however, exercised appellate jurisdiction to review issues not "inextricably intertwined" where review of the issue is "necessary to ensure meaningful review of" the issue properly on appeal. *Meredith v. Oregon*, 321 F.3d 807, 812-13 (9th Cir. 2003) (quoting *Swint*, 514 U.S. at 51, 115 S. Ct. 1203). "Resolution of subject matter jurisdiction . . . is 'necessary to ensure meaningful review of' the district court's interlocutory rulings because if the appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings.'" *Id.* at 816; *cf. Spencer Enters., Inc. v. United States*, 345 F.3d 683, 687 (9th Cir. 2003) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'. . . .") (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)) (alteration in original).

Accordingly, we have appellate jurisdiction over the subject matter jurisdiction issues.

B. The *Bivens* Right of Action

The INS officials contend that no right of action exists under *Bivens* to contest expedited removal under the INA, because the INA is a comprehensive remedial scheme intended to preclude a damages remedy.

Cf. Schweiker v. Chilicky, 487 U.S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); *Adams v. Johnson*, 355 F.3d 1179, 1183-84 (9th Cir. 2004). Interlocutory review of this issue is not available. *See Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 871 (9th Cir. 1992) (stating that the consideration of an argument against judicial creation of *Bivens* remedy was outside the limited scope of a qualified immunity interlocutory appeal), *criticized on other grounds in Behrens*, 516 U.S. at 308-09, 116 S. Ct. 834. Deciding this question requires the consideration of entirely distinct legal standards from, and its resolution is not a logical predicate to the resolution of, the qualified immunity issue.

Nor does the question whether a *Bivens* remedy may be inferred implicate the very power of the district court to issue the rulings on appeal:

> [Jurisdiction] is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946); *see also Janicki Logging Co. v. Mateer*, 42 F.3d 561, 563 (9th Cir. 1994) (determining that the district court had subject matter jurisdiction over a *Bivens* claim, but that the existence of a comprehensive remedial scheme counseled against permitting a *Bivens* remedy).

We therefore lack jurisdiction in this interlocutory appeal to review the district court's decision to infer a *Bivens* remedy.

C. Failure to State a Claim[13]

1. INS officials

The INS officials also seek review of the district court's denial of their motion to dismiss the constitutional and RFRA claims for failure to state a claim, a decision not ordinarily subject to immediate appeal. *See Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993). Whether a complaint fails to allege legally cognizable claims is, however, "inextricably intertwined" with the qualified immunity issue.

To determine whether the INS officials are entitled to qualified immunity, we must first consider whether, taken in the light most favorable to the plaintiff, the facts alleged show the violation of a constitutional or statutory right. *See Saucier*, 533 U.S. at 201, 121 S. Ct. 2151. Similarly, in reviewing a district court's denial of a motion to dismiss for failure to state a claim, we must consider whether, construing the allegations of the complaint in the light most favorable to the plaintiff, it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed.

---

[13] We use the phrase "failure to state a claim" to refer to the failure, as a substantive matter, to state a constitutional or statutory claim, not to the existence or nonexistence of a *Bivens* remedy.

2d 80 (1957)). So to determine whether the facts as alleged show that the INS officials violated a legal right (the qualified immunity inquiry), we have to determine whether the facts as alleged state a claim for violation of constitutional or statutory rights. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1198-99 & n.8 (9th Cir. 2000) (concluding that the review of a denial of a motion to dismiss for failure to state a claim is "part and parcel of the qualified immunity analysis"). We may therefore exercise pendent jurisdiction to review the district court's denial of the substantive motion to dismiss.

2. United States

The United States also moves to dismiss the RFRA claims for failure to state a claim, contending that we may exercise pendent party jurisdiction over its appeal because the issues raised in its appeal are coterminous with those raised by the INS officials' qualified immunity appeal. As will appear, however, our dismissal of the RFRA claim against the INS officials does not dispose of the RFRA claim against the United States. *See infra* at section V. We therefore lack jurisdiction over the United States' appeal. *See Huskey v. City of San Jose*, 204 F.3d 893, 905 (9th Cir. 2000) ("Th[e] narrow avenue for the continued use of pendent appellate jurisdiction left open by *Swint* would not apply to the instant case if our ruling on the merits of the collateral qualified immunity appeal did not resolve all of the remaining issues presented by the pendent appeal.").

III. THE INA'S JURISDICTIONAL PROVISIONS

In 1996, as part of IIRIRA, Congress passed several amendments to the INA circumscribing the availability of

judicial review. Three of the amendments may affect the district court's jurisdiction over Wong's claims. Keeping in mind the twin background principles that there is a strong presumption favoring judicial review of administrative decisions and that ambiguities in deportation statutes should be construed in favor of the alien, *see Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2002), we consider in turn, de novo, the effect of each relevant provision on subject matter jurisdiction. *See United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002).

A. 8 U.S.C. § 1252(a)(2)(B)—Review of Discretionary Decisions by the Attorney General[14]

Section 1252(a)(2)(B) reads in pertinent part:

> Denials of Discretionary Relief.—Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under [various provisions of the INA, including that governing adjustment of status, § 245], or
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General . . .

8 U.S.C. § 1252(a)(2)(B). The government maintains that this provision precludes jurisdiction in this *Bivens* action over Wong's challenges to the decisions regarding ad-

---

[14] All further references are to 8 U.S.C. unless otherwise noted.

justment of status, advance parole or permission to depart without advance parole, and revocation of parole.

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) (*AADC*), the Supreme Court interpreted § 1252(g). In the course of doing so, the Court cautioned that we must be careful not to read broadly language in the INA affecting court jurisdiction that is subject to a "much narrower" interpretation. *See id.* at 478-82, 119 S. Ct. 936. Consistent with that admonition, we have recognized that the § 1252(a)(2)(B) jurisdictional bar is not to be expanded beyond its precise language.

For example, decisions made on a purely legal basis may be reviewed, as they do not turn on discretionary judgment. *See Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169-70 (9th Cir. 2003) (decision that alien was statutorily barred from petitioning for adjustment of status was not discretionary and could be reviewed notwithstanding § 1252(a)(2)(B)); *Montero-Martinez*, 277 F.3d at 1143-44 (§ 1252(a)(2)(B) does not preclude jurisdiction over purely legal, and hence non-discretionary, questions). Moreover, decisions that violate the Constitution cannot be "discretionary," so claims of constitutional violations are not barred by § 1252(a)(2)(B). *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001); *see also Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001). In addition, § 1252(a)(2)(B)(ii) precludes jurisdiction only over decisions as to which discretionary authority is "specified" by statute, not all discretionary decisions. *See Spencer Enterprises, Inc.*, 345 F.3d at 689-90.

Under these precedents, the bar on review of discretionary decisions does not apply to Wong's claims. Her claims raise only constitutional or purely legal, nondiscretionary challenges to the decisions in question. Specifically, Wong's complaint alleges that the INS officials' handling of the advance parole, adjustment of status, and revocation of parole decisions was infected by various kinds of discriminatory animus in violation of the Constitution's guarantees against such bias. Her complaint also alleges that the INS officials' handling of these decisions violated RFRA and the due process guarantees of the Fifth Amendment. Section 1252(a)(2)(B) does not preclude the district court from entertaining such claims.

B. Section 1252(g)—Review of Decisions or Actions by the Attorney General to Commence Proceedings, Adjudicate Cases, or Execute Removal Orders

Section 1252(g) limits judicial review of certain decisions or actions of the Attorney General regarding removal.[15] That provision states:

> Exclusive Jurisdiction.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

---

[15] As the government recognizes, nothing in § 1252 bars the claims alleging that Wong's detention conditions violated the Constitution and RFRA.

8 U.S.C. § 1252(g).

AADC held that § 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" 525 U.S. at 482, 119 S. Ct. 936. Section 1252(g), consequently, does not bar "all claims relating in any way to deportation proceedings." *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc). As *AADC* noted, "[t]here are of course many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final deportation order . . . , and to refuse reconsideration of that order." *AADC*, 525 U.S. at 482, 119 S. Ct. 936.

Following *AADC*, we have narrowly construed § 1252(g). For example, we have held that "the reference to 'executing removal orders' appearing in [§ 1252(g)] should be interpreted narrowly, and not as referring to the underlying merits of the removal decision." *Maharaj v. Ashcroft*, 295 F.3d 963, 965 (9th Cir. 2002) (citations omitted). Similarly, in *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120-21 (9th Cir. 2001), we held that § 1252(g) does not bar judicial review of decisions or actions that occur *during* the formal adjudicatory process, because they are separate from the "decision to adjudicate." *Sulit v. Schiltgen*, 213 F.3d 449 (9th Cir. 2000), determined that § 1252(g) does not bar the due process claims of aliens alleging that their green cards were improperly seized without a hearing, that the INS failed to provide them with notice requiring them to surrender for

deportation, and that their counsel failed to notify them of the issuance of the court's decision. *See id.* at 452-53 & n.1; *see also Catholic Soc. Servs.*, 232 F.3d at 1150 (concluding that § 1252(g) does not limit jurisdiction to grant injunctive relief in a class action challenging the INS's advance parole policy). *But see Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (holding that § 1252(g)'s bar to judicial review of decision *whether* to commence proceedings precludes review of the decision *when* to commence proceedings).

Characterizing Wong's claims primarily as removal-based, the government urges that they are for the most part barred by § 1252(g). Although her complaint could be read to challenge the constitutionality of the removal itself, Wong has renounced such a broad reading of her ambiguous allegations, stating in her brief that:

> Plaintiffs' claims [do] not amount to a challenge of the decision of the INS to 'commence proceedings,' 'adjudicate cases,' or 'execute removal orders.' Rather, . . . Plaintiffs' claims arise from the discriminatory animus that motivated and underlay the actions of the individual defendants which *resulted in* the INS's decision to commence removal proceedings and ultimately to remove Plaintiff Wong from the United States.
>
> . . .
>
> The instant case . . . involves claims arising prior to any INS decision 'to commence proceedings against Wong, as well as claims that the Defendants placed Wong in a detention situation where she suffered constitutional injury at the hands of third parties.

(emphasis added). Wong thus disclaims any challenge to the execution of the removal itself, but rather asserts that her claims implicate only actions *other than* that removal, or the commencement of proceedings, if any, leading to that removal.[16]

Wong is correct that § 1252(g) does not bar review of the actions that occurred *prior* to any decision to "commence proceedings," if any, against her or to execute the removal order, such as the INS officials' allegedly discriminatory decisions regarding advance parole, adjustment of status, and revocation of parole. *See Humphries v. Various Fed. USINS Employees*, 164 F.3d 936, 944 (5th Cir. 1999) ("[W]e would defy logic by holding that a claim for relief somehow 'aris[es] from' decisions and actions accomplished only after the injury allegedly occurred.") (second alteration in original). None of these decisions involves the discrete actions enumerated in § 1252(g).

---

[16] Of course, Wong will be held in the remainder of this litigation to her representations in this court regarding the intended reach of her complaint. Wong's representations in this court are construed as a waiver of any claims focusing on the execution of the removal or the commencement, if any, of removal proceedings. *Cf. Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1095-96 (9th Cir. 1985) (where Postal Service had abandoned its statutory claims on appeal, court of appeals remanded with instructions to the district court to enter summary judgment against the Service where the Service had no remedies apart from those already abandoned).

C. Section 1252(a)(2)(A)—Jurisdiction to Review Any Cause or Claim Arising From or Relating to Implementation or Operation of an Expedited Removal Order

Similarly, the government asserts that § 1252(a)(2)(A), which deals directly with the expedited removal procedure under which Wong was removed, may also be implicated by Wong's claims. Section 1252(a)(2)(A) reads in relevant part:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> > (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1) [setting forth procedures for expedited removal],
> >
> > (ii) except as provided in subsection (e), a decision by the Attorney 'General to invoke the provisions of such section, [or]
> >
> > (iii) the application of such section to individual aliens, including the determination made [as to eligibility for asylum].

8 U.S.C. § 1252(a)(2)(A). Subsection (e) provides that no court may "enter declaratory, injunctive, or other equitable relief in any action pertaining to an [expedited removal order]," unless certain exceptions not applicable here apply. 8 U.S.C. § 1252(e)(1)(A).

Like § 1252(g), § 1252(a)(2)(A) does not preclude Wong's claims concerning events that occurred prior to

the decision to initiate her expedited removal—namely, the claims challenging the adjustment of status, advance parole, and revocation of parole decisions. None of these claims implicates actions covered by § 1252(a)(2)(A). And, as we explained above, Wong has expressly disclaimed interpreting her complaint to include a challenge to her expedited removal, maintaining instead that the complaint challenges only the decisions described above, which preceded her removal.[17]

We conclude that the district court properly exercised jurisdiction over Wong's claims regarding advance parole, adjustment of status, and parole revocation, as well as over her detention-related claims.

IV. WONG'S CONSTITUTIONAL CLAIMS

We are now ready to consider the merits of this appeal.

The qualified immunity defense "'shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Behrens*, 516 U.S. at 305, 116 S. Ct. 834 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102

---

[17] For the same reason, we do not consider whether § 1252(a)(2)(A)'s restrictions on "jurisdiction to review" applies only to petitions for review of decisions of the Bureau of Immigration Appeals, and not to *Bivens* claims such as Wong's. *Cf. Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818 (9th Cir. 2004) ("We are . . . well aware of the fact that the language 'jurisdiction to review' is generally construed to mean review on direct appeal rather than collateral review on habeas corpus.").

S. Ct. 2727, 73 L. Ed. 2d 396 (1982)) (alterations in original). In deciding whether the INS officials are entitled to qualified immunity, we must undertake two inquiries, both de novo:[18] (1) whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right"; and, if a violation of a constitutional right is found, (2) "whether the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S. Ct. 2151.

A. Deprivation of a Constitutional Right

1. Detention-Related Claims

Wong alleges that by, *inter alia*, denying her vegetarian meals, subjecting her to strip searches, and denying her access to her followers, the INS officials subjected her to detention conditions that violated her First Amendment right to freely practice her religion and her Fourth Amendment right to be free of unreasonable searches and seizures.

Wong correctly argues that direct, personal participation is not necessary to establish liability for a constitutional violation. *See Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). "The requisite causal connection can be established . . . also by setting in motion a series of

---

[18] *See Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002) (stating that we review qualified immunity decisions de novo). A district court's decision on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is also reviewed de novo. *See Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 927 (9th Cir. 2002).

acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743-44; *see also Stevenson v. Koskey*, 877 F.2d 1435, 1439 (9th Cir. 1989) (causation is established where officer participates in the affirmative acts of another that, acting concurrently, result in deprivation of federal rights). The critical question is whether it was reasonably foreseeable that the actions of the particular INS officials who are named as defendants would lead to the rights violations alleged to have occurred during Wong's detention. *See Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1044 (9th Cir. 1994) (where official did not directly cause a constitutional violation, plaintiff must show the violation was reasonably foreseeable to him).

Wong's first amended complaint, however, fails to identify what role, if any, each individual defendant had in placing her in detention, much less whether any of the named INS officials knew or reasonably should have known of the detention conditions to which Wong would be subjected. Without providing the identity of the official or officials who caused the alleged violations, the complaint merely states that

> Ms. Wong was arrested, handcuffed and placed in detention. She was then taken to the Multnomah County Detention Center where she was subjected to a strip search, including an orifice search, on two separate occasions. Ms. Wong was imprisoned for a total of five days.

First Amended Complaint at ¶ 21. With respect to the individual actions of the named defendants, the complaint makes only the following allegations:

"Beebe improperly revoked Ms. Wong's parole status," *id.* at ¶ 18;"Glover and O'Brien erroneously issued a 'Notice and Order of Expedited Removal' and a Determination of Inadmissibility," *id.* at ¶ 19; and

"Ms. Wong was given a letter denying her application for the adjustment of status signed by Garcia for Beebe," *id.* at ¶ 21.

The complaint thus fails to identify how the actions of the individual INS officials could foreseeably have caused the First and Fourth Amendment violations Wong is alleged to have suffered while in detention. It is possible that, upon identifying those officials responsible for placing her in detention and for overseeing detention conditions at the INS contract facility in question, Wong may be able to amend her complaint to properly allege constitutional violations *by those officials.* Her current complaint, however, is insufficient to allege any detention-related constitutional violations by the named INS officials, none of whom is alleged to have played a role in placing her in detention.[19]

---

[19] The second amended complaint, unlike the first, alleges that the defendants "caus[ed] Wong to be unlawfully detained and [knew] or ha[d] reason to know she would be subjected to at least two strip searches, including an orifice search . . . and [knew] or ha[d] reason to know Wong would be denied vegetarian meals to accommodate her religious tenet." Although these allegations may be sufficient to meet the applicable legal standards, we do not consider them here, as the second amended complaint has been neither accepted nor reviewed by the district court.

We conclude that the allegations of the operative, first amended complaint are insufficient to establish a constitutional violation regarding Wong's detention conditions on the part of the named INS officials. As far as the complaint demonstrates, the actions of the named INS officials were simply too far removed from the violations of which Wong complains. Accordingly, Wong's detention-related claims against the named INS officials must be dismissed for failure to state a claim.[20]

2. Due Process

Wong appears to allege that the INS officials violated her procedural due process rights by revoking her temporary parole without first deciding her adjustment of status application. On the bare pleadings, it is difficult to ascertain the contours of this claim, and Wong's briefing before this court has not clarified the legal basis for her allegation that the parole revocation and failure to first decide her adjustment of status application violated the Due Process Clause. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the mean-

---

[20] We reiterate that we do not decide whether the complaint might be amended to state a claim against the INS official or officials who placed Wong in detention, or the official or officials responsible for monitoring conditions at the detention center, *see* 8 U.S.C. § 1231(g)(1) (providing that "[t]he Attorney General shall arrange for appropriate places of detention"). *Cf.* Fed. R. Civ. P. 15(a) ("[L]eave [to amend] shall be freely given when justice so requires."); Fed. R. Civ. P. 15(c)(3) (permitting relation back of amended pleadings).

ing of the Due Process Clause of the Fifth . . . Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). We can discern no substantive liberty or property interest, however, in temporary parole status, and Wong has alleged none. Section 1182(d)(5)(A) provides that the Attorney General may

> *in his discretion* parole into the United States temporarily under such conditions as he may prescribe . . . any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(emphasis added); *cf. Sidhu v. Ashcroft*, 368 F.3d 1160 (9th Cir. 2004) (adopting the BIA's more detailed entry criteria). The INA does not create any liberty interest in temporary parole that is protected by the Fifth Amendment. Rather, the statute makes clear that whether and for how long temporary parole is granted are matters entirely within the discretion of the Attorney General. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (explaining that to possess a property interest in a government benefit, an individual must possess "a legitimate claim of entitlement to it"). *Compare Meachum v. Fano*, 427 U.S. 215, 228, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) (holding that a prisoner's interest in not being transferred to another prison facility is "too emphemeral and insubstantial to trigger

procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all"), *with Bd. of Pardons v. Allen*, 482 U.S. 369, 377-78, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987) (holding that a state prisoner has a liberty interest in parole release where the state statute uses mandatory language creating a presumption that parole release will be granted).

Wong's due process claim must therefore be dismissed.

3. Discrimination Claims

Wong alleges that the INS officials acted out of discriminatory animus in making their various decisions, including the decisions involving adjustment of status, advance parole, and revocation of temporary parole. Specifically, she alleges that the INS officials discriminated against her on the basis of her race and/or her national origin,[21] and on the basis of her religious practices, beliefs, and association. Taking her allegations in the light most favorable to her, Wong has alleged violations of the equal protection component of the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954), based on the INS officials' actions. With the exception of the advance parole claim, these allegations could be sufficient to entitle Wong to relief if she is ultimately able to prove that the

---

[21] We understand Wong's national origin discrimination claim to refer to her ethnicity and not to her country of origin.

INS officials' actions were motivated by unlawful discriminatory animus.[22]

Wong's advance parole claim must fail because she has not alleged that any of the individual INS defendants were in any way involved with the decision not to grant her a waiver of the advance parole requirement. Her complaint merely states that "Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advanced parole, but was unsuccessful." While it is possible that Wong might be able to make out a claim against some INS official based on the allegedly discriminatory advance parole decision, her claim must be dismissed as to the named INS officials, as nothing in the complaint links any of them to unconstitutional behavior with regard to the advance parole issue. *See Paine v. City of Lompoc*, 265 F.3d 975, 984 (9th Cir. 2001) ("[I]n resolving a motion for summary judgment based on qualified immunity, a court must carefully examine the specific factual allegations against each individual defendant.") (quoting *Cunningham*, 229 F.3d at 1287). Thus, the facts alleged in the complaint do not establish that any defendant "officer's conduct violated a constitutional right" with regard to the advance parole decision. *Saucier*, 533 U.S. at 201, 121 S. Ct. 2151.

As to Wong's remaining discrimination claims, the INS officials maintain that her "bare allegations" that the INS

---

[22] We discuss later the question whether Wong is precluded from asserting these otherwise cognizable constitutional rights because of her status as a temporarily paroled alien. *See infra*, at 973-75.

officials' conduct was due to discriminatory animus are legally insufficient to survive a motion to dismiss for failure to state a claim. This contention is wrong.

As *Swierkiewicz* demonstrates, and as we have had occasion to reiterate recently, the government's contention is belied by federal notice pleading principles. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061-63 (9th Cir. 2004) (holding that the plaintiff's admittedly "opaque[]" allegations of discriminatory retaliation were sufficient to withstand a motion to dismiss). "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz*, 534 U.S. at 514, 122 S. Ct. 992 (alteration in original) (citation omitted). *Swierkiewicz* specifically disclaimed any requirement that discrimination plaintiffs plead all the elements of a prima facie case. *See id.* at 510-13, 122 S. Ct. 992; *see also Edwards*, 356 F.3d at 1061-62. Instead, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Swierkiewicz*, 534 U.S. at 512, 122 S. Ct. 992. Such statement must give the defendant fair notice of the basis for the plaintiff's claims. *See Swierkiewicz*, 534 U.S. at 512, 514, 122 S. Ct. 992; *Edwards*, 356 F.3d at 1061.

Indeed, in *Swierkiewicz* the Court rejected the very policy argument made by the INS officials in this case:

> Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled

> [plaintiffs] to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard. . . . A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

Id. at 514-15, 122 S. Ct. 992 (citation omitted); *see also Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (applying *Swierkiewicz* to evaluate the complaint in a 42 U.S.C. § 1983 action and concluding that previous cases requiring heightened pleading of improper motive in constitutional tort cases "are no longer good law").

The INS officials also contend that Wong alleges claims of selective enforcement which *AADC* held are not constitutionally cognizable. Citing concerns about judicial interference with the INS's prosecutorial discretion and the need to prevent obstruction and prolongation of the execution of removal orders, *AADC* indeed announced a "general rule" against selective prosecution claims as a "defense against [] deportation." *See* 525 U.S. at 488-91, 119 S. Ct. 936.

Wong, however, does not assert any claims as a defense against exclusion or deportation. Indeed, her claims of discriminatory adjustment of status and parole revocation decisions cannot fairly be characterized as selective *prosecution* claims at all. The claims do not implicate the Attorney General's *prosecutorial* discretion—that is, in this context, his discretion to choose to deport one person rather than another among those who are illegally in the

country. Rather, Wong alleges that the INS officials denied her various immigration benefits because of her membership in a protected class. As such, the challenged administrative actions, as construed in light of Wong's concessions in the course of this litigation, do not involve the expedited removal itself, and do not pose the threat of obstruction of the institution of removal proceedings or the execution of removal orders about which *AADC* was concerned. *See id.* Wong's discrimination claims are not precluded by *AADC*.

4. Applicability of Entry Fiction to Wong's Constitutional Claims

The INS officials do not contest that Wong was entitled to constitutional protections on her return despite her brief departure. They argue only that the extent of Wong's constitutional rights was not clearly established, because she was an alien lacking entry papers upon her return. As a result, the INS officials maintain, a reasonable official would not have known that Wong was entitled to the full panoply of protections offered by the Constitution.

Despite the limited scope of the officials' argument, we must address to some degree the extent of Wong's entitlement to constitutional rights. *Saucier* counsels that we must first determine whether a constitutional right has adequately been alleged by the plaintiff before turning to the "clearly established" prong. *See* 533 U.S. at 200, 121 S. Ct. 2151 ("[T]he requisites of a qualified immunity defense must be considered in proper sequence."); *Doe v. Lebbos*, 348 F.3d 820, 828 (9th Cir. 2003) (noting that although the parties did not brief the issue of whether the

plaintiff had adequately alleged the violation of a constitutional right, "[w]e are obligated under *Saucier* . . . to address this issue at the outset of our qualified immunity analysis"). In light of our preceding discussion concluding that only Wong's discrimination claims continue to be viable, *see supra* at 969, we limit our substantive constitutional analysis to her entitlement to the rights implicated by those claims.[23]

The Supreme Court has long recognized a distinction between the constitutional rights afforded those who have effected an entry into the U.S., whether legally or otherwise, and those considered never to have entered. *See Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); *Xi v. U.S. INS*, 298 F.3d 832, 837 (9th Cir. 2002). Aliens inside the U.S., regardless of whether their presence here is temporary or unlawful, are entitled to certain constitutional protections unavailable to those outside our borders. *See Zadvydas*, 533 U.S. at 693-94, 121 S. Ct. 2491; *see also Plyler v. Doe*, 457 U.S. 202, 210, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Yick*

---

[23] We do not consider separately the measure of constitutional rights to which Tien Tao's members might be entitled. The complaint contains no allegation that Tien Tao is suing on behalf of its members, or that its members are U.S. residents, let alone individuals in a different immigration status than Wong.

Wo v. Hopkins, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) ("[The Fourteenth Amendment's] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.").

At the same time, under the "entry fiction" recognized in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953), an alien seeking admission has not "entered" the United States, even if the alien is in fact physically present.[24] *See id.* at 213, 215, 73 S. Ct. 625; *see also Kaplan v. Tod*, 267 U.S. 228, 230, 45 S. Ct. 257, 69 L. Ed. 585 (1925) (though present in the United States, excluded alien "was still in theory of law at the boundary line and had gained no foothold in the United States"). Applying this legal fiction, *Mezei* held that the procedural due process rights of an alien detained on Ellis Island were not violated when he was excluded without a hearing. *See Mezei*, 345 U.S. at 214, 73 S. Ct. 625. *Mezei* explained:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by

---

[24] Aliens granted temporary parole under 8 U.S.C. § 1182(d)(5)(A) fall into this category, as they have not been granted admission to the U.S. *See id.* ("[P]arole of such alien shall not be regarded as an admission of the alien. . . ."); *supra* n.8.

> Congress is, it is due process as far as an alien denied entry is concerned."

Id. at 212, 73 S. Ct. 625 (internal citations omitted).

The entry fiction thus appears determinative of the *procedural* rights of aliens with respect to their applications for admission. The entry doctrine has not, however, been applied, by the Supreme Court or by this court, to deny all constitutional rights to non-admitted aliens.[25] As *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc),[26] explained, "[w]hile it is . . . clear that excludable aliens have no procedural due process rights in the admission process, the law is not settled with regard to nonprocedural rights." *Id.* at 1449; *see also Zadvydas*, 533 U.S. at 693, 121 S. Ct. 2491 ("It is well established that *certain* constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.") (emphasis added); *id.* at

---

[25] For the purposes of this opinion, we use the term "non-admitted aliens" to describe those aliens who have presented themselves for immigration inspection and have not been granted an administrative determination of admissibility into the U.S., including those who are paroled in under 8 U.S.C. § 1182(d)(5)(A). We do not use the term to refer to those aliens who were not rejected during immigration inspection and are nonetheless present in this country illegally.

[26] We note that *Barrera-Echavarria*'s statutory holding—that 8 U.S.C. § 1227(a)(1) authorized the indefinite detention of aliens subject to exclusion proceedings—has since been superseded by statute. See *Xi v. INS*, 298 F.3d 832, 837 (9th Cir. 2002) (explaining that the statute interpreted in *Barrera-Echavarria* "no longer exists" and that the statute now applicable is 8 U.S.C. § 1231(a)(6)).

703-04, 121 S. Ct. 2491 (Scalia, J., dissenting) (noting that the entry fiction only "makes perfect sense . . . with regard to the question of what *procedures* are necessary to prevent entry, as opposed to what *procedures* are necessary to eject a person already in the United States"). *Barrera-Echavarria* then went on to consider specifically whether such aliens have a constitutional right to be free from extended detention, concluding that they do not.[27] *See* 44 F.3d at 1449.

Our sister circuits have likewise posited that the entry fiction is pertinent mostly with respect to the narrow question of the scope of procedural rights available in the admissions process, and is not necessarily applicable with regard to other constitutional rights. In *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987), for example, the Fifth Circuit held that the entry fiction "determines the aliens' rights with regard to immigration and deportation proceedings[,]" but "does not limit the right of excludable

---

[27] *Barrera-Echavarria* concluded that *Barrera*'s case was controlled by *Mezei*, which, the court explained, suggests that "excludable aliens simply enjoy no constitutional right to be paroled into the United States, even if the only alternative is prolonged detention." 44 F.3d at 1450. *Barrera-Echavarria* went on to explain that its decision was premised on the fact that Barrera's detention was not indefinite, but was instead a series of one-year periods of detention followed by an opportunity for release, and as such, was constitutional. *Id.* at 1450. Thus, although the court noted that this outcome was "reasonabl[e]" in light of the entry fiction, its decision was based for the most part on considerations particular to the substantive due process right asserted in that case—the right to be free of detention.

aliens detained within United States territory to humane treatment." *Id.* at 1373.

Similarly, the Third Circuit has recognized that "[e]ven an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process." *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999); *see also Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir.) (en banc) ("The fact that excludable aliens are entitled to less process . . . does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."), *cert. denied*, 539 U.S. 941, 123 S. Ct. 2607, 156 L. Ed. 2d 627 (2003);[28] *Sierra v. INS*, 258 F.3d 1213, 1218 n.3 (10th Cir. 2001) (noting that the entry fiction "applies to procedural due process challenges such as Sierra's. This case does not involve, and we do not address, a substantive due process challenge").

---

[28] We recognize that the ultimate holding of *Rosales-Garcia*—that the detention of Cuban nationals under the Cuban Review Plan violates due process, see 322 F.3d at 412-13—conflicts with *Barrera-Echavarria*'s conclusion that it does not, *see* 44 F.3d at 1450. *Rosales-Garcia* characterized the Cuban Review Plan as permitting indefinite detention, *see* 322 F.3d at 412 n.30, whereas the *Barrera-Echavarria* court specifically noted that the Plan's annual review procedures distinguished that case from one involving indefinite detention, *see* 44 F.3d at 1450. For our analysis, this disagreement on an issue not before us is not pertinent. Rather, what matters for present purposes is that we are in agreement with the Sixth Circuit on the more general principle that the entry fiction is dispositive with respect to procedural rights in the admissions process, but not necessarily with respect to other constitutional protections.

The decisions of courts confronted with the everyday reality of the great number of non-admitted aliens living and working in the American community reflect an understanding that such aliens are undeniably "persons" entitled to constitutional protection, especially with respect to areas not implicating the government's plenary power to regulate immigration. Several courts have held, for example, that non-admitted aliens in the criminal justice system may not be punished prior to an adjudication of guilt in conformance with due process of law, a Fifth and Sixth Amendment safeguard available to citizens and aliens alike. *See Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 & n.6 (9th Cir. 1991) (considering whether detention of excluded Cuban refugee violated his substantive due process rights, and noting that Fifth and Sixth Amendments apply to aliens as well as citizens); *Lynch*, 810 F.2d at 1374 ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials."). Courts have held that non-admitted aliens are entitled to *Miranda* warnings prior to custodial interrogations. *See, e.g., United States v. Moya*, 74 F.3d 1117, 1119 (11th Cir. 1996); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979).

The Supreme Court has also indicated that the equal protection component of the Fifth Amendment's Due Process Clause extends to non-admitted aliens. In *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976), the Court considered whether a statute conditioning eligibility for medicare benefits on five years of continuous residence and admission for permanent residence

violated the equal protection rights of Cuban refugees granted temporary parole under 8 U.S.C. § 1182(d)(5). *See* 426 U.S. at 75 n.7, 77-83, 96 S. Ct. 1883. *Mathews* explained that

> [t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

Id. at 77, 96 S. Ct. 1883 (citations omitted). The Court's sweeping language clearly applied to aliens temporarily paroled into the United States, as two of the plaintiffs were so paroled. *See id.* at 75 n.7, 96 S. Ct. 1883. *Mathews'* significance for present purposes is that the entry fiction does not preclude substantive constitutional protection, including protection under the equal protection component of the Fifth Amendment's Due Process Clause, for aliens paroled into the country after having been stopped at the border.

The cases discussed above indicate that the entry doctrine does not categorically exclude non-admitted aliens from all constitutional coverage, including coverage by equal protection guarantees. Recognizing such a logical endpoint to the entry fiction prevents its application from becoming an exercise inconsistent with our basic constitutional values. It also vitiates the perverse incentive that would otherwise exist for aliens to evade immigration checkpoints altogether and thereby acquire constitutional protections. The entry fiction is best seen, instead, as a

fairly narrow doctrine that primarily determines the *procedures* that the executive branch must follow before turning an immigrant away. Otherwise, the doctrine would allow any number of abuses to be deemed constitutionally permissible merely by labelling certain "persons" as non-persons. As Justice Marshall forcefully articulated in his dissenting opinion in *Jean v. Nelson*, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985), addressing a question the majority declined to reach:

> [T]he principle that unadmitted aliens have no constitutionally protected rights defies rationality. Under this view, the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. He might argue that scarce immigration resources could be better spent by hiring additional agents to patrol our borders than by providing food for detainees. Surely we would not condone mass starvation.

Id. at 874, 105 S. Ct. 2992 (Marshall, J., dissenting); *see also Zadvydas*, 533 U.S. at 704, 121 S. Ct. 2491 (Scalia, J., dissenting) ("I am sure[deportable aliens] cannot be tortured, as well. . . .").

In light of these considerations, Justice Marshall concluded in *Jean* that *Mezei's* determination with respect to procedural due process rights "is not applicable to the separate constitutional question whether the Government may establish a policy of making parole decisions on the basis of race or national origin without articulating any justification for its discriminatory conduct." *Jean*, 472 U.S. at 879, 105 S. Ct. 2992 (Marshall, J., dissenting). In his view, "in the absence of any reasons closely related to

immigration concerns," the government may not discriminate against unadmitted aliens on the basis of race or national origin. *Id.* at 881-82, 105 S. Ct. 2992.

We are persuaded by the considerations outlined above, and by Justice Marshall's opinion addressing essentially the same question presented here, that the entry fiction does not preclude non-admitted aliens such as Wong from coming within the ambit of the equal protection component of the Due Process Clause. We cannot countenance that the Constitution would permit immigration officials to engage in such behavior as rounding up all immigration parolees of a particular race solely because of a consideration such as skin color.[29]

---

[29] We do not here address the question whether racial, ethnic, or religious discrimination against immigration parolees is tested by the usual heightened scrutiny applicable to such classifications. *See Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (stating that "all racial classifications imposed by government must be analyzed . . . under strict scrutiny") (citation and internal quotation marks omitted); *Christian Sci. Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010, 1012 (9th Cir. 1986) (classifications based on religious sect are suspect), *as amended by* 792 F.2d 124 (9th Cir. 1986). Again, at this juncture we need consider only whether there is any state of facts consistent with the complaint on which Wong could prevail. *See Swierkiewicz*, 534 U.S. at 514, 122 S. Ct. 992. Applying that standard, one set of facts consistent with the complaint is that the defendants refused Wong adjustment of status, or other unidentified INS officials refused her a waiver of advance parole prior to her departure, solely on the basis of her race, ethnicity, or religion, and for no immigration-related reason or other governmental purpose. Were that the case, Wong could prevail even under the "wholly

Although "Congress has 'plenary power' to create immigration law, and . . . the judicial branch must defer to executive and legislative branch decisionmaking in that area, ... that power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695, 121 S. Ct. 2491; *cf. Fiallo v. Bell*, 430 U.S. 787, 793 n.5, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens. . . ."). We can imagine no proper governmental interest furthered by the purely invidious discrimination alleged to have been carried out by individual INS officers in this case.

Were there any doubt regarding this general proposition, our decision in this case that the allegations of racial, ethnic, and religious discrimination with regard to decisions concerning temporary parole and adjustment of status are sufficient to state a claim of constitutional violation might still be compelled by both the procedural posture of this case and several considerations particular to Wong. Again, Wong's equal protection claim cannot be dismissed for failure to state a claim unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz*, 534 U.S. at 514, 122 S. Ct. 992 (citation and internal quotation marks omitted); *see also Conley*, 355 U.S. at 45-46, 78

---

irrational" standard applied in *Mathews*, where no putatively suspect classification was alleged. In the current posture of this case, that is all we need decide.

S. Ct. 99 ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Wong alleges that she resided in the United States continuously for seven years, before her brief departure undertaken under exigent circumstances. She left the country for only eighteen days—a period far briefer than Mezei's "protracted" stay abroad of nineteen months. *See Mezei*, 345 U.S. at 214, 73 S. Ct. 625; *Zadvydas*, 533 U.S. at 693, 121 S. Ct. 2491 (discussing Mezei's "extended departure"). More importantly, Wong alleges that her failure to obtain advance parole or a waiver of the requirement was due to invidious discrimination by immigration officials prior to her departure, at which time she undisputedly had a right to be free from such discrimination.[30] *See Plyler*, 457 U.S. at 215, 102 S. Ct. 2382. Had Wong been granted such a waiver, she would have returned to the United States with the same immigration status she held prior to her departure, and her entitlement to equal protection would have been unquestioned. Under these circumstances, Wong would more properly be viewed as an alien to whom the entry fiction does not apply, as she would have been allowed to enter on her return, and therefore as an alien who is for constitutional purposes "within the United States . . . whether [her] presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S.

---

[30] We note that we do not rule out the possibility that Wong's pre-departure discrimination claim with respect to advance parole may still be viable were she to amend her complaint.

at 693, 121 S. Ct. 2491. We are for that reason as well unable to conclude that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz*, 534 U.S. at 514, 122 S. Ct. 992 (citation and internal quotation marks omitted).

We therefore conclude that Wong's allegations of invidious discrimination are sufficient at this pleading stage to make out a Fifth Amendment discrimination claim arising out of the INS officials' actions with respect to revocation of Wong's temporary parole status and post-return rejection of her adjustment of status applications.

B. Whether the Law Was Clearly Established

Even where a constitutional violation has occurred, whether an official asserting qualified immunity may be held liable "generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (internal citation omitted). Because of the uncertainty surrounding the constitutional status of an alien in Wong's unusual position during the period after her return, we conclude that Wong has not alleged violations of clearly established law. "'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034) (alterations in original); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1075

(9th Cir. 2001) (en banc) ("[W]hat is required is that government officials have 'fair and clear warning' that their conduct is unlawful.") (citation omitted). In other words, "in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034) (internal quotation marks omitted).

A reasonable INS official very well could have been unsure of the level of constitutional protection against discrimination afforded to aliens in Wong's rather unique circumstances.[31] Although we suggested in *Barrera-Echavarria* that aliens in Wong's position *might* have some constitutional rights, we have never squarely held that such aliens are entitled to equal protection guarantees, nor has the Supreme Court.

Indeed, a dispute over the very issue whether the government can discriminate in granting parole to non-admitted aliens on the basis of race divided the Eleventh Circuit en banc court in *Jean*, *see Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), and led to Justice Marshall's dissent on the question when the Supreme Court majority declined to reach the issue. *See Jean*, 472 U.S.

---

[31] We repeat that Wong has only stated a cognizable cause of action against the present defendants with regard to the adjustment of status and revocation of temporary parole decisions made after her return. Were we considering the decisions made before her departure, the entry fiction would not be pertinent, Wong's status as an individual on the *Plyler v. Doe/Zadvydas* side of the constitutional divide would be plain, and it is quite likely that our conclusion regarding qualified immunity would be otherwise than it is.

at 868-82, 105 S. Ct. 2992 (Marshall, J., dissenting). Under these circumstances of constitutional uncertainty regarding race discrimination against nonadmitted aliens, the contours of any constitutional doctrine we now recognize were not sufficiently clear that a reasonable INS officer would have realized that Wong after her return was entitled to Fifth Amendment equal protection with regard to immigration-related decisions.[32]

Further, while we have concluded that Wong's particular circumstances support the conclusion that it was unconstitutional to discriminate against her on the basis of race, ethnicity, or religion, the complaint does not allege that the present defendants knew that she had been discriminated against with regard to the advance parole or waiver decisions. In the absence of such knowledge, the present defendants were not aware of this reason why Wong could not be discriminated against in violation of the equal protection component of the Due Process Clause.

We therefore conclude that the INS officials are entitled to qualified immunity on Wong's remaining discrimination claims.

---

[32] We note that were the race, ethnicity, and religion-based equal protection claims in this case unrelated to Wong's immigration status, we doubt the responsible government officials would be entitled to qualified immunity. As far as we are aware, no court has ever held or indicated that paroled aliens can be subjected to race-based discrimination with regard to issues such as school attendance or police protection while physically within the borders of the country; we suspect no reasonable governmental official could believe such discrimination to be legal.

V. RFRA CLAIMS

The INS officials contend that qualified immunity is available as a defense to Wong's RFRA claims, asserting that they are entitled to prevail on qualified immunity grounds. Neither this court nor any other court of appeals has decided whether qualified immunity is available to a federal government official sued under RFRA.[33] We do not reach that question, however.

Wong and Tien Tao assert that by subjecting Wong to strip searches, denying her vegetarian meals, denying her

---

[33] Although the INS officials cited to *Resnick v. Adams*, 317 F.3d 1056 (9th Cir. 2003), as a case applying qualified immunity to a RFRA claim, that opinion has since been amended to clarify that the RFRA claim was not considered on appeal. *See* 348 F.3d 763, 766 (9th Cir. 2003) (noting that *Resnick* had amended his complaint to drop his RFRA cause of action). We have, in earlier cases, considered qualified immunity in the context of a cause of action under 42 U.S.C. § 1983 premised on violations of RFRA. *See, e.g., May v. Baldwin*, 109 F.3d 557, 561-62 (9th Cir. 1997) (concluding that prison officials were entitled to qualified immunity in § 1983 suit alleging violations of RFRA); *Friedman v. South*, 92 F.3d 989, 989 (9th Cir. 1996) (holding that RFRA is inapplicable to § 1983 action alleging violations predating RFRA's enactment, because prison officials are entitled to qualified immunity when law is not clearly established). These cases predate *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), which held RFRA to be unconstitutional as applied to state and local governments. More recently, in *Kaahumanu v. County of Maui*, 315 F.3d 1215 (9th Cir. 2003), we declined to consider whether legislative immunity extends to suits brought under the statute enacted to replace the void provisions of RFRA, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. *See id.* at 1219 n.3.

access to her followers, and removing her, the INS officials substantially burdened their religious rights in violation of RFRA. For the reasons discussed above, Wong does not in the presently operative complaint state a claim against the INS officials for violation of her religious rights, because she has failed to allege that any of the individual defendants had anything to do with the detention conditions to which she was subjected. *See supra* at 967.

The question whether the complaint adequately alleges a causal relationship between the actions of the individual INS officials and Wong's detention-based injuries for RFRA purposes is governed by the same legal standard as the question whether the complaint adequately alleges a causal relationship between those actions and Wong's detention-based injuries for constitutional purposes. *See, e.g., Stevenson*, 877 F.2d at 1439 (explaining that causation can be established by showing that the officer participated in the affirmative acts of another that, acting concurrently, resulted in a deprivation of federal rights). Our resolution of the causation issue with respect to Wong's constitutional claim "necessarily resolves" the causation issue with respect to her RFRA claim. *Cunningham*, 229 F.3d at 1285 (citations omitted). The two questions are therefore inextricably intertwined. As the RFRA cause of action thus fails without regard to qualified immunity, we do not reach that issue of first impression. We therefore dismiss Wong's RFRA claims as against the individual defendants.

Because we do not reach the question whether Wong has otherwise alleged a violation of RFRA, we do not have

jurisdiction over the United States' appeal with respect to the RFRA claim.

VI. CONCLUSION

We AFFIRM the district court's denial of the INS officials' motion to dismiss for lack of subject matter jurisdiction. We REVERSE the district court's denial of the INS officials' motion to dismiss, on the respective grounds enumerated in this opinion, on all claims against the individual defendants. We decline to exercise jurisdiction over the appeal of the United States, and REMAND the remainder of the action for proceedings consistent with this opinion.

Each party shall bear its own costs.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG AND WU-WEI TIEN TAO ASSOCIATION, PLAINTIFFS

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL, AND THE UNITED STATES OF AMERICA, DEFENDANTS

Apr. 11, 2007

ORDER

JONES, Judge:

Magistrate Judge Janice M. Stewart filed Findings and Recommendation (#443) on January 24, 2007, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Ma-*

chines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiffs and defendants have timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Stewart's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Stewart's Findings and Recommendation (#443) dated January 24, 2007, in its entirety. Plaintiff Wong's motion (#400) for partial summary judgment against the defendants David V. Beebe and the United States of America is denied; defendant David Beebe's motion (#403) for summary judgment is granted in part and denied in part; and defendant United States' motion (#405) for summary judgment is granted in part and denied in part as follows:

First Claim (Fourth Amendment):

Deny summary judgment both to Wong and Beebe as to whether the strip searches violated the Fourth Amendment

Second Claim (First Amendment):

Grant summary judgment to Beebe

Third Claim (Declaratory Judgment):

Grant summary judgment to the United States

Fourth Claim (RFRA):

Grant summary judgment to Beebe and deny summary judgment to Wong

Fifth Claim (FTCA):

False Imprisonment: Grant summary judgment to the United States and deny summary judgment to Wong

Invasion of Privacy: Grant summary judgment to the United States and deny summary judgment to Wong

Negligence:

Grant summary judgment to the United States against the Wu-Wei Tien Tao Association as to all specifications;

Grant summary judgment to the United States against Wong and deny summary judgment to Wong as to sending letters containing misstatements and adjudicating adjustment of status application;

Deny summary judgment to the United States against Wong and deny summary judgment to Wong as to conditions of confinement.

I further deny plaintiffs' motion (#454) to supplement the summary judgment record.

IT IS SO ORDERED.

DATED this 10th day of Apr., 2007.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CV-01-718-ST

KWAI FUN WONG AND WU WEI TIEN TAO ASSOCIATION, PLAINTIFFS

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL, AND THE UNITED STATES OF AMERICA, DEFENDANTS

Filed: Jan. 24, 2007

FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate Judge:

INTRODUCTION

Following a July 24, 2002 appeal to the Ninth Circuit (*Wong v. United States Immigration & Naturalization Serv., et al*, 373 F3d 952 (9th Cir 2004)), and further proceedings in this court on remand, plaintiffs filed a Fourth Amended Complaint (docket #170), followed by a Fifth Amended Complaint (docket #350).

Plaintiff Kwai Fun Wong ("Wong") alleges that she is the Matriarch of the Tao Heritage, and the spiritual leader

of plaintiff Wu Wei Tien Tao Association ("Association"), a worldwide non-profit religious organization registered in Oregon.[1] Wong, who was born in Hong Kong, is a Tien Tao minister[2] and first entered the United States on July 14, 1992. Seven years later, Wong was subjected to an expedited removal from the United States. The surrounding circumstances of that removal form the basis for plaintiffs' claims in this case.

Wong alleges that her constitutional rights and her rights under the Religious Freedom Restoration Act, 42 USC § 2000bb-1 ("RFRA"), were violated by her arrest and removal from the United States in June 1999 by the

---

[1] Plaintiffs allege that the Association was formerly known as "Tien Tao Association, Inc." and is made up of four legal entities, namely Wu Wei Tien Tao Association Oregon; Tien Tao Association, Houston; Wu Wei Tien Tao Association, Texas; and Wu Wei Tien Tao Association, New York. Fifth Amended Complaint, ¶ 4; Plaintiffs' Corrected Memorandum in Opposition to United States' Motion for Summary Judgment (docket #421), p. 17. Defendants argue that the Association *of Oregon* is the only entity seeking damages in this case and that plaintiffs have no claim to damages based on loss of affiliation by legally and financially independent organizations in New York and Texas. As discussed below, the claims of the Association (both local and "worldwide") are barred so this court need not determine the extent of damages which might flow from those claims.

[2] There is a dispute over the date Wong became a minister. Plaintiffs' Concise Statement of Material Facts (docket #417), ¶ 6; App 4, 18-19. However, for purposes of these motions, this court accepts as true Wong's assertions about the length of her ministry, the sincerity of her religious beliefs, and the requirements and proscriptions of her faith.

Immigration and Naturalization Service ("INS")[3] and David V. Beebe ("Beebe"),[4] the former District Director of the INS office in Portland, Oregon. She also alleges that the United States improperly denied her the right to request reopening or reconsideration of the denial of her request for adjustment of status and subjected her to various torts which are cognizable against the United States under the Federal Tort Claims Act ("FTCA"), 28 USC §§ 1346(b), 2671-80.

Presently, Wong alleges three claims against Beebe for: (1) violation of the Fourth Amendment premised upon the strip searches she endured during her five-day detention (Fifth Amended Complaint, ¶¶ 36-38) ("First Claim"); (2) denial of her right to practice her religion in violation of the First Amendment (*id* at ¶¶ 39-41) ("Second Claim"); and (3) violation of RFRA based on her assertion that the exercise of her religion was substantially burdened by the denial of her adjustment of status application and the conditions under which she was detained (*id* at ¶¶ 46-48) ("Fourth Claim"). Wong and the Association also allege two claims against the United States for: (1) declaratory relief that they are entitled to pursue their post-denial

---

[3] All functions of the INS have now been transferred to the Department of Homeland Security ("DHS"). However, because this agency was known as the INS at all times relevant to plaintiffs' allegations, this court will refer to it as the INS, as did the Ninth Circuit. *Wong*, 373 F3d at 958 n4.

[4] Beebe served as the District Director in the Portland INS Office for approximately 12 years, until his retirement in October 2000. App 106-07.

rights to request reopening or reconsideration of the denial of Wong's April 20, 1999 application for adjustment of status[5] (*id* at ¶¶ 42-45) ("Third Claim"); and (2) violation of the FTCA based on the torts of false imprisonment, invasion of privacy, and negligence (*id* at ¶¶ 49-51) ("Fifth Claim").

Wong has now filed a Motion for Partial Summary Judgment (docket #400) only on her First Claim against Beebe for violation of the Fourth Amendment by causing her to be strip searched twice and her Fifth Claim against the United States under the Federal Tort Claims Act premised upon claims for invasion of privacy, negligence, and false imprisonment. In response, defendants have filed cross-motions for summary judgment, namely Beebe's Motion for Summary Judgment (docket #403) and the United States' Motion for Summary Judgment (docket #405) against each of plaintiffs' claims.

For the reasons that follow, this court recommends that Wong's motion be denied and that Beebe's motion and the United States' motion be granted in part and denied in part, leaving for trial only Wong's claims against Beebe for violation of the Fourth Amendment (First Claim) and against the United States for negligence with respect to her conditions of confinement (Fifth Claim).

---

[5] As discussed in more detail below, Wong filed a total of three applications for adjustment of status. However, plaintiffs do not seek to reopen or reconsider the first two applications for adjustment of status which were filed December 2, 1992 (Plaintiffs' Ex 3 and App 12-14) and December 8, 1994 (Plaintiffs' Ex 3 and App 33-36).

DISCUSSION

I. Background Facts and Pertinent Allegations

A. Wong's Ministry and Entry into the United States

Wong became a Minister of Tien Tao in the mid-1980s. At that time, the last Patriarch of Tien Tao, Wu Wei Lao Zhu (Elder Cheung Fat Fan, respectfully called Qian Ren), was bringing many people to the United States to spread the Tien Tao to the West. Wong first entered the United States on July 14, 1992, under a B-2 visitor visa issued by the INS on March 11, 1992. Shortly after Wong's entry into the United States, the Tien Tao Association, Inc., filed a petition for an immigrant visa on behalf of Wong, asking that she be granted special immigrant status as a religious worker. Appendix in Support of Defendants' Motions for Summary Judgment ("App") attached to Declaration of R. Joseph Sher, 1-10 (Form I-360, Petition for Amerasian, Widower, or Special Immigrant, and supporting documentation). That petition was approved on November 9, 1992. App 11.

On December 2, 1992, Wong filed her first Form I-485 (Application for Permanent Residence), seeking permanent resident status. App 12-14. She filed a second Form I-485, (Application to Register Permanent Residence or Adjust Status) on December 8, 1994.[6] App

---

[6] In early January 1993, Wong applied for and received an advance parole document authorizing her to reenter the United States any time before March 4, 1993. App 16. Wong apparently left the United States in early 1993, but did not reenter the United States until two weeks after the advance parole authorization expired. On

33-36. Some time thereafter, pursuant to the instructions of Qian Ren, Wong relocated to Oregon and became involved in the Association in Oregon.

As part of her adherence to Tien Tao, Wong took instructions and received guidance from Qian Ren. Qian Ren formed and started the Tien Tao Association, which was registered in the State of Oregon and whose name was later changed to Wu Wei Tien Tao Association.

B. 1999 Departure From and Return to the United States

Qian Ren died in Houston, Texas, on March 16, 1999. On March 25, 1999, without first obtaining advance parole, Wong departed the United States in order to arrange and attend his funeral. When she returned to the United States (through the San Francisco port of entry) on April 13, 1999 (App 43), Wong was ordered to report to the Portland INS office for a deferred inspection on April 28,

---

March 19, 1993, Wong entered the United States using her B-2 visitor visa, gaining entry through September 18, 1993. App 21, 69. Wong again left the country and reentered on September 9, 1993. App 28, 69. Some time later, Wong again departed the United States and sought to reenter on November 14, 1994, by again presenting her B-2 visitor visa. App 32. However, she was referred for secondary inspection when the immigration officer noticed that she had an I-485 petition pending. *Id.* Her departure without advance parole necessitated the refiling of Wong's I-485 petition, which she filed during the time of her parole in to the United States between November 14 and December 28, 1994. App 31 & 226; 8 CFR 245.2(a)(4)(ii)(B).

1999. App 43, 50-51. Shortly thereafter, Wong contacted her attorney in Portland. App 264.

On April 15, 1999, Wong filed an Application for Advance Parole (Form I-131). App 70.[7] Then, on April 20, 1999, a week before the scheduled date of her deferred inspection at the Portland INS office, Wong's attorney sent a Form I-485 (Application to Register Permanent Residence or Adjust Status) to the INS's Nebraska Service Center. App 44-47, 51. A week later, her attorney notified the Portland INS office, by means of a letter dated April 26, 1999, addressed to the INS's Portland Port Director, Jack O'Brien ("O'Brien"), that Wong had abandoned her prior adjustment of status application, had filed a new adjustment of status application and would not be appearing for the deferred inspection on April 28, 1999, explaining:

> Under current immigration law, [Wong] is immediately allowed to refile her adjustment application under Section 245(i) of the [INA] based on an approved petition with a priority date of October 30, 1992. Attached is a copy of the INS cover letter and Federal Express confirmation the alien's adjustment application refiled in the Nebraska Service Center on April 20, 1999.
>
> In order to avoid possible detention and removal from the United States at the time of her deferred inspection, I have asked [Wong] not to appear for the defer-

---

[7] Although the form was supposedly filed April 15, 1999 (App 48 & 70), it was not signed by Wong until April 19, 1999, and by Wong's attorney until April 22, 1999 (App 49).

> red inspection at this time. Should you require anything further or still wish to see [Wong], please let me know.

App 51.

Shortly before the time set for Wong's deferred inspection, one of her attorneys, Gretel Ness ("Ness"), contacted Douglas Glover ("Glover"), a Supervisory Immigration Inspector in the Portland INS Office, and asked him if he had seen the April 26, 1999 letter, explaining that she believed Wong was eligible for adjustment of status under INA § 245(i), 8 USC § 1255(i). App 188. Glover told Ness that he needed to research the issue. App 190 (Glover Depo, p. 25).

C. INS Response to Post-Return Filings

Shortly thereafter,[8] Beebe convened a meeting to discuss the letter from Wong's attorney. Beebe, Gerry Garcia ("Garcia") (the Assistant District Director for Examinations in the Portland INS Office), Glover, O'Brien (Glover's supervisor), and Phillip Crawford ("Crawford") (the Deputy District Director at the Portland INS Office)

---

[8] It is unclear from the record exactly when this meeting took place. However, Glover testified that the first time he became aware of Wong was during the telephone call from Ness (App 188), and Garcia testified that the meeting involved the letter which stated that Wong would not be appearing for her deferred inspection (App 181). Thus, this meeting apparently took place some time between the date when Ness contacted Glover (after the letter was sent on April 26, 1999) and the date scheduled for deferred inspection (April 28, 1999).

all attended the meeting. During the discussion, Garcia stated that if Wong did not appear, she would be a fugitive from justice. App 181 (Garcia Depo, p. 12). In response to Beebe's question regarding a pending application for adjustment of status, Garcia said that if Wong had left the United States without advance parole, then the application for adjustment of status was abandoned. *Id.* He also told Beebe that he believed that a person who was paroled into the United States was not eligible to apply under INA § 245(i), 8 USC § 1255(i). App 182 (Garcia Depo, p. 13).

Beebe asked Garcia to request Wong's I-485 application from the Nebraska Service Center.[9] *Id.* Garcia then had to leave the meeting, and the meeting continued between Beebe, O'Brien, Glover, and Crawford. App 183 (Garcia Depo, p. 14). The "consensus was that an Expedited Removal Order should be entered into the file" and that "parole should be revoked at the time." App 149-50 (Crawford Depo, pp. 70-71).

Although he had authority to sign it himself, O'Brien later went to the office of the two Supervisory Immigration Inspectors (Glover and Greg Fiorentino) and requested that "someone . . . sign a . . . determination of inadmissibility" (Form I-860), notifying Wong that she was ineligible for admission to the United States

---

[9] According to Beebe, adjustment of status applicants "typically had their adjustment applications forwarded, or they were instructed to forward their adjustment applications to one of four service processing centers in the United States operated by the Immigration Service for consideration." App 118 (Beebe Depo, p. 71).

because at the time of her application for admission (her return from Hong Kong on April 13, 1999), she was not in possession of a valid unexpired immigrant visa. App 54, 189-90 (Glover Depo, pp. 21-25). At that time, it "appear[ed to Glover] the decision had been made to place [Wong] into expedited removal proceedings, and since by that time [Glover] had some understanding of the case . . . [he] was asked to sign [the Notice and Order of Expedited Removal]." App 190 (Glover Depo, p. 25). The Order of Removal is dated May 20, 1999, and signed by both Glover and O'Brien. App 54.

D. Adjudication of Form I-485

Wong's adjustment of status application was referred to Pamela Cooley ("Cooley"), an adjudications officer in the Portland INS Office. Plaintiffs' Ex 46 (Cooley Depo), p. 11; Plaintiffs' Ex 47 (Garcia Depo), p. 15. Although adjustment of status applicants are generally brought in for a personal interview (Plaintiffs' Ex 47 (Garcia Depo), p. 31), Cooley did not interview Wong or contact her attorneys. Plaintiffs' Ex 46 (Cooley Depo), p. 54. Cooley recalls Garcia telling her that she needed to adjudicate Wong's adjustment of status application fairly quickly and that there was "pressure" to get Wong's adjustment of status request adjudicated quickly, but she does not recall any conversations as to the reasons for the rush. *Id* at 43-44.

Normally Cooley's practice is to review the entire contents of the applicant's A-file prior to making a decision on an adjustment of status application. *Id* at 74-75. Cooley, Elizabeth Godfrey ("Godfrey"), a Deportation Officer, and

Garcia discussed Wong's eligibility to adjust status with three pending adjustment of status applications. App 142 (Cooley Depo, pp. 51-52). They "all concluded together that [Wong] did not merit adjustment of status" because she had "circumvented the normal immigrant visa processing processes." App 142, 145-46 (Cooley Depo, pp. 52, 73-74). Cooley reviewed Wong's application for adjustment of status, prepared a written decision, and forwarded the decision to Garcia for review. App 142 (Cooley Depo, p. 51). Garcia reviewed and approved the letter denying the applications and signed it for Beebe, as was standard practice. App 68-70, 184-85 (Garcia Depo, pp. 25-26). Garcia did not discuss the denial of Wong's applications with Beebe before he signed it. App 184 (Garcia Depo, p. 25). Although an I-485 adjudication normally takes from 12 to 24 months, Wong's was adjudicated in less than two months. Plaintiffs' Ex 47 (Garcia Depo), p. 37. Of the 12 or so religious worker adjustment of status applications that were adjudicated in the INS's Portland office, Wong's was the first one ever denied. Plaintiffs' Ex 47 (Garcia Depo), pp. 20-21; Plaintiffs' Ex 46 (Cooley Depo), p. 38.

E. Employment Authorization Letter and Wong's Arrest

Although unknown to Wong at the time, all of her pending I-485 applications were denied on June 3, 1999. Plaintiffs' Ex 10. On or about June 10, 1999, Beebe sent Wong an Employment Authorization Letter. Plaintiffs' Ex 11. In part, the letter claimed to have been written to Wong:

> to acknowledge receipt of [her I-485] application [and to notify her that] [p]ending final approval of [her] application, please be aware of the following: 1. The current processing time for this type of application(s) is fifteen (15) months. . . 3. If you applied for an Employment Authorization Document [which she did] you are scheduled to appear at this office on Thurs 6-17-99 at 1:30 pm to receive your document in Room #117.

Id.

The issuance of the Employment Authorization Letter to Wong after denial of her I-485 applications directly contravened the INS policy prohibiting the use of such subterfuges for the purpose of luring unsuspecting individuals into an INS office in order to arrest, deport, and remove them from the country. Plaintiffs' Ex 19 (Crawford Depo), pp 47-49.

In compliance with the Employment Authorization Letter, Wong appeared at the scheduled time in the INS's Portland office on Thursday, June 17, 1999, with Ness, her attorney, and Lily Li ("Li"), her interpreter. App 267 (Ness Depo, pp. 38-39). However, instead of having her employment authorization document processed, she was interviewed by immigration inspector Ron Spaude about her April 13, 1999 return from Hong Kong. App 65-67. Spaude never spoke to Beebe about Wong, and Beebe apparently was not in the office at that time. App 252 (Li Depo, pp. 223-24), 267 (Ness Depo, p. 40), 272 (Spaude Depo, p. 35).

Wong was then provided with a copy of a letter dated that same day (June 17) and signed by Garcia denying her three applications for adjustment of status. App 68-70, 184 (Garcia Depo, p. 25). That letter provided in part that "the decisions in this case are not subject to review given your final order of removal pursuant to Section 235(b)(1) of the Act, as amended." App 70.

Wong was then detained. Godfrey escorted Wong to the detention area. App 176. Because the INS had no detention facilities in Portland, it detained people in county jails. App 167 (Edenfield Depo, p. 9). After being handcuffed, Wong was transported by INS officer Richard Horne ("Horne") to the Multnomah County Detention Center ("MCDC") where she was booked. Plaintiffs' Exs 15-17; Plaintiffs' Ex 1 (Wong Depo), pp. 98-121, 127-137, 153-156.

F. Requests for Vegetarian Meals

As Wong was being escorted to the INS detention area, Li told Godfrey that Wong had taken vows as a "lifetime vegetarian" and could not eat meat or any of five "impure vegetables," including garlic, onion, leek, tobacco, and alcohol. App 177 (Godfrey Depo, pp. 31-32), 247 (Li Depo, pp. 170-72); Plaintiffs' Ex 1 (Wong Depo), p. 105. Horne was told by someone at the Portland INS office that Wong needed vegetarian food, so he wrote "please vegetarian food only, thank you" on the booking form at MCDC. App 71 (booking sheet); App 216-17 (Horne Depo, pp. 32-33). Although Godfrey understood that Wong's vegetarian diet was related to her religion (App 177 (Godfrey Depo, p. 32)), she either did not communicate

that part of the information to Horne, or if she did, Horne neglected to specify it in the booking form. App 71.

The term "vegetarian," as apparently used by Tien Tao adherents, means a strict vegetarian (or vegan) diet excluding all animal products, including dairy products and eggs. Plaintiffs' Ex 38. Someone at MCDC brought Wong milk and "what appeared to be an egg and ham sandwich" which she could not eat. Plaintiffs' Ex 1 (Wong Depo), p. 109. After being transferred to another jail (Inverness), Wong was only given "meat, eggs and milk," which she could not eat. *Id* at 113. On the second day of her detention, the woman who delivered meals at that facility, Susan Liu ("Liu"), spoke Cantonese and became concerned because Wong was eating so little. *Id* at 114. Wong told Liu she was a vegetarian and had no one there to interpret for her. *Id.* Liu helped Wong place a phone call to Li and to fill out the necessary paperwork so that Li could visit Wong in jail. *Id* at 115. On the third day of her detention, Li visited Wong in the jail. *Id* at 118. She told Wong she was going to contact Wong's attorney to arrange for Wong's release and arrange vegetarian meals for her. *Id* at 129.

MCDC offered religious and medical diets. App 391-92. However, any request for special meals based on religious grounds had to be communicated through the chaplain. App 391-96 (Yankee Depo, pp. 9-20). Li contacted both Godfrey and Paige Edenfield ("Edenfield"), the su-

pervisory Detention and Deportation Officer,[10] several times after Wong was detained and told her that Wong was not receiving a vegetarian diet. Plaintiffs' Ex 31 (Li Depo), pp. 180-84. Although both Godfrey and Edenfield assured Li that they would contact Multnomah County about the issue, the record is devoid of evidence indicating that either Godfrey or Edenfield contacted Multnomah County and communicated that Wong needed a vegetarian diet based on religious grounds.

Either because MCDC assumed the request on the booking form was medically based, or because Wong followed Liu's suggestion a day or two later to tell the jail's doctor that eggs, meat and milk made her "very uncomfortable" (Plaintiffs' Ex 1 (Wong Depo), pp. 119-21), at some unknown time during Wong's detention, MCDC slated her to receive a "VEGETARIAN/BLAND/MILK-FREE/NO EGGS" diet. App 72.

G. Strip Searches

During her detention with Multnomah County, Wong was subjected to two strip searches, first when being transferred from MCDC to Inverness Jail and again when being transferred back to MCDC. Plaintiffs' Ex 1 (Wong Depo), pp. 111-12, 133; App 53. She was required to remove all her clothing and bend over in front of male jail staff so that visual body cavity searches could be conducted. *Id* at 111-12. She found these searches embar-

---

[10] Edenfield does not recall ever being contacted by Li or MCDC with regard to vegetarian meals. Plaintiffs' Ex 28 (Edenfield Depo), pp. 14-15.

rassing and upsetting. *Id.* These searches were undertaken pursuant to a provision in the Multnomah County Sheriff's Office Division Operational Procedure Manual (1995 Edition) which required strip searches "[b]efore a change of housing assignment from Reception or transfer to a different Multnomah County facility." Plaintiffs' Ex 20 (Multnomah County Sheriff's Office Division Operational Procedure Manual (1995 Edition), CD07.109.053, subpart 4).

The INS policies prohibit strip searches of detainees by either the INS or its contractors in detention facilities absent "some rational relationship to institution safety or security" or "a reasonable suspicion that contraband or evidence may be concealed on the person." Plaintiffs' Exs 22-25; Plaintiffs' Ex 26 (Beebe Depo), p. 68. At no time did the INS have a reason to believe that Wong was in possession of drugs, weapons or contraband. Plaintiffs' Ex 29 (Godfrey Depo), pp 32-33 (no reason to believe she was carrying weapons and no reason to frisk (pat search) her); Plaintiffs' Ex 30 (Horne Depo), pp 8-9, 38-39 (no particular concern about safety when transporting Wong; no reason to believe Wong was carrying a weapon or was in possession of contraband).

INS officers regularly inspect facilities in which INS detainees will be held, including a review of the existing policies and procedures. Plaintiffs' Ex 29 (Godfrey Depo) pp. 42-46. During the relevant time period, the inspection forms were given to Edenfield or the Assistant District Director for Detention, Deportation and Parole and then forwarded to headquarters. *Id.* Edenfield knew

that everyone booked into MCDC was strip searched. App 170 (Edenfield Depo, pp. 15-16).

Beebe was unaware that MCDC routinely strip searched everyone placed in its custody, but would not have been "concerned" or "bothered . . . a bit" if MCDC routinely strip searched INS detainees. App 116 (Beebe Depo), p. 65. Instead, he deferred to the Multnomah County Sheriff regarding the operation and management of his detention facilities and did not believe it would have been prudent to approach the sheriff with a proposal not to routinely strip search the INS's detainees. Plaintiffs' Ex 26 (Beebe Depo), pp. 66-69.

H. Removal

On June 22, 1999, after spending five days in detention, Wong was transferred from MCDC custody to INS custody, transported to the airport, escorted from Portland to San Francisco, and removed from the United States on a flight to Hong Kong. App 74, 325-26 (Wong Depo, pp. 154-55), 397-98 (Yankee Depo, pp. 21-22).

II. Claims Against Beebe

Beebe seeks summary judgment against each of Wong's claims on the basis of qualified immunity.[11] The First Claim (Fourth Amendment), the Second Claim (First Amendment), and the Fourth Claim (RFRA) are premised

---

[11] This court previously concluded that federal officials sued under RFRA are entitled to raise a qualified immunity defense. Findings and Recommendation dated April 26, 2005, pp. 20-21 (docket #151), adopted by Order dated June 28, 2005 (docket #169).

upon one or more of three events or series of events. First, Wong alleges that the denial of her adjustment of status application violated both her First Amendment and RFRA rights (Second and Fourth Claims).[12] Second, she alleges that she was denied meals adequate to sustain her in good health that satisfied the dietary laws of her religion in violation of both her First Amendment and RFRA rights (Second and Fourth Claims). Finally, she alleges that the two strip searches she endured while detained by the INS violated her Fourth Amendment and RFRA rights (First and Fourth Claims).

A. Qualified Immunity

The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 US 800, 818 (1982). To determine whether

---

[12] Defendants argue that Wong raises no RFRA claim premised upon the denial of her adjustment of status application based on a sentence in one of this court's prior opinions. *See* Reply Memorandum in Support of David Beebe's Motion for Summary Judgment (docket #428), p. 14, n. 9. However, Wong contends that she does raise such a claim and the sentence cited by defendants was simply this court's summary of what it could discern were the ways in which Wong alleged that her "right to practice her religion" were infringed. The sentence relied on by defendants is *dicta* based on this court's struggle to accurately understand and analyze Wong's claims. In order not to unduly prejudice Wong, this court will not rely its perhaps too-narrow interpretation of her Third Amended Complaint.

Beebe is entitled to qualified immunity, this court must follow two analytical steps, as discussed in *Saucier v. Katz*, 533 US 194, 201 (2001); *see also Moreno v. Baca*, 431 F3d 633, 638 (9th Cir 2005). The first step is to determine whether, viewing the record in the light most favorable to the party asserting the injury, the officer's conduct violated a constitutional right. *Saucier*, 533 US at 201. If so, the next inquiry is whether the right was clearly established at the time alleged. *Moreno*, 431 F3d at 638.

There is no *respondeat superior* liability in constitutional tort actions. *Terrell v. Brewer*, 935 F2d 1015, 1018 (9th Cir 1991). As a result, Beebe cannot be held liable simply due to his position as the District Director of the Portland INS Office. Instead, supervisory defendants must play an "affirmative part in the alleged deprivation of constitutional rights." *Graves v. City of Coeur D' Alene*, 339 F3d 828, 848 (9th Cir 2003). A supervisor is liable for the constitutional violations of subordinates "if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F2d 1040, 1045 (9th Cir 1989). "[T]he critical question is whether it was reasonably foreseeable that the actions of the particular INS officials who are named as defendants would lead to the rights violations alleged to have occurred during Wong's detention." *Wong*, 373 F3d at 966, citing *Gini v. Los Vegas Metro. Police Dep't*, 40 F3d 1041, 1044 (9th Cir 1994). It is sufficient if the defendant set into motion a series of acts by others which the defendant knew or reasonably should have known would cause others to inflict the constitutional injury. *Hydrick v. Hunter*, 466 F3d 676, 689 (9th Cir

2006), citing *Johnson v. Duffy*, 588 F2d 740, 743-44 (9th Cir 1978).

B. Denial of Adjustment of Status Application

Wong filed three applications for adjustment of status. Her claims against Beebe for violating the First Amendment (Second Claim) and RFRA (Fourth Claim) are based in part on her contention that the denial of her third (April 20, 1999) application for adjustment of status was the result of discrimination against her due to her religious practices, beliefs, or association. Fifth Amended Complaint, ¶ 32. After a careful review of the record in this case, this court concludes that Bebee is entitled to summary judgment against these claims because they either allege claims (right of access to followers) previously dismissed by this court or because Beebe enjoys qualified immunity on the basis that the law was not clearly established.

1. Claims Previously Dismissed

In considering previous motions filed in this case, this court has struggled to correctly construe and analyze Wong's claims. In those endeavors, this court has construed Wong's allegations of interference with her religious rights under the First Amendment and RFRA as encompassing interference with a right of association (Wong's right to associate with her followers and vice versa) and interference with a right to practice her religion (due to the conditions under which she was detained). This court distinguished the allegations concerning Wong's conditions of confinement (strip searches and denial of vegetarian meals) from other allegations which

did not burden the practice of Wong's religion, including allegations that she was denied a translator and access to information about her rights or how to contact her attorney. Findings and Recommendation (April 26, 2005) (docket #151) ("April 26, 2005 F&R"), adopted by Order dated June 28, 2005 (docket #169). This court dismissed all claims by both Wong and the Association insofar as they were premised upon plaintiffs' associational rights. *Id* at 21-23 (RFRA claim); Findings and Recommendation (November 17, 2005) (docket #238), p. 7, adopted by Order dated January 9, 2006 (docket #284) (First Amendment claim).

In an effort to distance the First Amendment and RFRA claims alleged in the Fifth Amended Complaint from those rulings, Wong contends that the discriminatory denial of her application for adjustment of status infringed her right to practice her religion by substantially interfering with her ability to carry out the instructions of her spiritual leader, Qian Ren, to maintain and supervise all activities at an altar in Oregon, as well as with her ability, as the chosen Matriarch and Qian Ren's successor, to lead the Tien Tao arena nationwide. Although Wong does not further explain this new recharacterization of the allegations, it is evident that the inability to associate with her followers is at least part of the causal link between the alleged harm (the allegedly discriminatory denial of the adjustment of status application) and the alleged injuries (inability to maintain and supervise all activities at the Oregon alter and to lead the Tien Tao arena nationwide). For the same reasons previously articulated by this court,

any claim premised upon a denial of associational rights fails.

Although this court previously understood that a claim to a denial of associational right was the only allegation of these claims separate and apart from Wong's conditions of confinement claims, Wong now appears to assert that the denial of her adjustment of status application resulted in her removal from the United States (which interfered with her ability to act as the chosen Matriarch and to faithfully carry out Qian Ren's instruction to maintain an Oregon altar). However, Wong has failed to allege or establish any clearly established right to have her adjustment of status application approved in order for her to be in the United States to perform her religious functions. Moreover, Wong was removed because an Order of Removal was entered against her (on May 20, 1999), which took place prior to the ruling on her adjustment of status application (on June 3, 1999). The entry and execution of the Order of Removal may not be reviewed by this court, *see* 8 USC § 1252 (a) & (g), and the pending application for adjustment of status did not suspend or terminate removal proceedings, *see Rubio De Cachu v. INS*, 568 F2d 625, 628 (9th Cir 1977), leaving Wong to argue that Beebe should have exercised his discretion differently to adjust her status. However, the INA precludes such a claim. *See* 8 USC § 1252(a)(2)(B) (stripping courts of jurisdiction to review denials of discretionary relief, including denials of adjustment of status applications). For these reasons alone, Bebee is entitled to summary judgment against the First Amendment and RFRA claims to the extent they are

premised upon an allegedly discriminatory denial of Wong's adjustment of status application.

2. Qualified Immunity

Even if the above arguments proved no hurdle to Wong's First Amendment and RFRA claims based on a denial of her adjustment of status application, Bebee argues that he is entitled to qualified immunity due to a lack of a clearly established right. This court agrees.

Wong's religious discrimination claims are premised upon the contention that Bebee denied her adjustment of status application due to animus against Wong's religious beliefs or practices. Thus, the issue is whether Wong had a constitutional right to have her adjustment of status application adjudicated without the taint of religiously-based discriminatory animus, and if so, whether that right was clearly established at the time Bebee denied Wong's adjustment of status application.[13]

Wong argues forcefully that Bebee was responsible for the denial of her adjustment of status application, duped her into coming in to pick up her employment papers so that he could then have her arrested, and started into motion the events that led to her unconstitutional strip/orifice searches and summary removal from the United States. Even construing these contentions in Wong's favor, Wong has failed to present any authority that she

---

[13] This court previously addressed but rejected the argument that Wong's immigration status affected her claims of unlawful conditions of confinement. April 26, 2005 F&R, pp. 21-23.

had a First Amendment or RFRA right to an adjudication of her adjustment of status application free of discriminatory animus.

The Ninth Circuit previously held "Wong's allegations of invidious discrimination [were] sufficient . . . to make out a Fifth Amendment discrimination claim arising out of the INS officials' actions with respect to [the] post-return rejection of her adjustment of status applications" *Wong*, 373 F3d at 975. Nevertheless, due to "the uncertainty surrounding the constitutional status of an alien in Wong's unusual position during the period after her return," the Ninth Circuit granted qualified immunity to INS officials on Wong's equal protection claims finding that Wong had not alleged violations of clearly established law. *Id* at 976. The court reached this conclusion based upon the dearth of case law by either the Supreme Court or the Ninth Circuit recognizing a right to be free from discrimination in such immigration proceedings:

> Although we [previously] suggested . . . that aliens in Wong's position *might* have some constitutional rights, we have never squarely held that such aliens are entitled to equal protection guarantees, nor has the Supreme Court. . . . Under these circumstances of constitutional uncertainty regarding race discrimination against nonadmitted aliens, the contours of any constitutional doctrine we now recognize were not sufficiently clear that a reasonable INS officer would have realized that Wong after her return was entitled to Fifth Amendment equal protection with regard to immigration-related decisions.

Id (emphasis in original, citations omitted).

Key to the Ninth Circuit's decision was Wong's immigration status under the "entry fiction," under which she was deemed to have not yet "entered" the country for immigration purposes, even though she was physically present inside the borders of the United States. *Wong*, 373 F3d at 976 n31 (emphasizing that it was "quite likely" that qualified immunity would not protect defendants if decisions made before her departure were under consideration). The Ninth Circuit later noted that in *Wong* it "[c]onfronted for the first time . . . the question whether the entry fiction deprives non-admitted aliens of all substantive constitutional rights" and lamented that, even after *Wong*, the "precise reach of the entry fiction doctrine is unclear." *Alvarez-Garcia v Ashcroft*, 378 F3d 1094, 1098 (9th Cir 2004).

Thus, for the same reasons articulated by the Ninth Circuit with regard to Wong's Fifth Amendment claims, Wong has failed to establish that she had a clearly established statutory or constitutional right for an adjudication free of discriminatory animus at the time of that denial. Bebee therefore is entitled to qualified immunity from the First Amendment claim. This same line of reasoning forecloses any RFRA claim premised upon the denial of Wong's third adjustment of status application.

As a result, Beebe is entitled to summary judgment on the Second Claim (First Amendment) and Fourth Claim (RFRA) to the extent those claims are premised upon a constitutional violation due to the denial of Wong's application for adjustment of status.

C. **Meals Provided in Detention**

Beebe also is entitled to summary judgment against Wong's Second and Fourth Claims to the extent they are premised upon the denial of a vegetarian diet while detained. There is simply no evidence linking Beebe with the failure to provide meals which would adequately meet Wong's religious needs.

The record reveals that Multnomah County had in place a policy of accommodating medically or religiously based dietary requests. Religiously-based dietary requests had to be made through the jail's chaplain. A request for "vegetarian food only" might generate a medical inquiry as to the basis of the request, but not a religious inquiry. Unlike the situation with the strip searches (discussed below), that policy does not give rise to any inference that Beebe either knew or should have known that Wong's religiously-based dietary needs would not be met in Multnomah County jails. Moreover, nothing in the record indicates that Beebe was aware of the inadequacy of the meals Wong was receiving, of Li's calls to Godfrey and Edenfield, or of Wong's communications to MCDC staff regarding the religious insufficiency of the meals at MCDC.

Absent evidence making this linkage between Beebe and the jail's conduct, Beebe is entitled to summary judgment against the Second Claim (First Amendment) and Fourth Claim (RFRA) insofar as they are based on the assertion that Beebe violated Wong's First Amendment rights by denying her meals sufficient to meet the requirements of her religion.

D. Strip Searches

1. Fourth Amendment (First Claim)

Both Wong and Beebe seek summary judgment on her First Claim against Beebe for subjecting her to strip searches in violation of the Fourth Amendment. Beebe does not contest that the type of blanket strip searches to which Wong was twice subjected violate the Fourth Amendment.[14] Instead, he argues that he is entitled to qualified immunity for two reasons: (1) he did not cause the violation of Wong's Fourth Amendment rights; and (2) even if he did, Wong's right not to be subjected to an unreasonable search of her body was not clearly established in June 1999.

a. Constitutional Violation

Wong argues that even if Beebe did not conduct the strip searches himself, he is liable because he set in motion the series of events that led to the violation of her Fourth Amendment rights.

It is unclear what role Beebe played in deciding that Wong was inadmissable or removable. Beebe did not sign the Notice and Order of Expedited Removal and denies ever making or consulting on any decisions regarding Wong and claims that he was not aware of the Wong case prior to her removal. App 110, 113, 134-35 (Beebe Depo, pp. 47, 53, 117-18). Yet other witnesses confirm that he

---

[14] The first strip search occurred when Wong entered MCDC and the second strip search occurred later when she was transferred between Multnomah County jails.

convened and attended a meeting to discuss Wong's adjustment of status application which she had filed with the INS's Nebraska Service Center. Beebe asked to have her file transferred to Oregon and the meeting resulted in the decision to revoke Wong's parole. After that meeting, Garcia told Cooley that Wong's application had to be adjudicated quickly because there was pressure from somewhere to do so. Although an adjudication of an I-485 normally takes from 12 to 24 months, Wong's I-485 was adjudicated in less than two months. During that process, Wong's attorneys were never contacted for information. Of the 12 or so religious worker adjustment of status applications that were adjudicated in the Portland District Office, Wong's was the only one ever denied. For purposes of this motion, this court must view the facts most favorably to Wong. From that perspective, it is reasonable to infer that Beebe played an affirmative role in causing Wong's revocation of parole, denial of adjustment of status, and removal.

The decision regarding where to detain Wong was made by the on-duty detention supervisor at the time of Wong's transfer to detention, not by Beebe. However, the record raises an issue of fact as to whether Beebe knew or should have known that if Wong was removed, she would be transferred to a Multnomah County jail and subjected to a strip search. As Beebe acknowledges, he was ultimately responsible for the conditions in the detention facilities. App 115 (Beebe Depo, p. 64). Under 8 USC § 1231(g)(1), the district director of the INS is mandated to "arrange for appropriate places of detention for aliens detained pending removal or a decision on re-

moval." As the District Director, Beebe signed the contract with the Multnomah County Sheriff for housing INS detainees in 1994 (App 421-30), and Edenfield signed the contract extension in 1999. Although the record is not clear, it appears that the only other detention facilities used by the INS Portland office at that time were the Yamhill County and Clark County jails. Plaintiffs' Ex 28 (Edenfield Depo), p. 16; Plaintiffs' Ex 41. Although Beebe had the authority to use detention facilities other than local jails, such as hotels and motels, he choose not to do so, apparently for financial reasons. *Id*; Plaintiffs' Ex 26, pp. 66-67; Plaintiffs' Exs 40 & 41 (January 1999 refusal by Port of Portland and Delta Airlines to take custody and arrange housing for detained aliens due to cost of providing security). Therefore, Beebe knew that Wong would be detained at a local jail, including MCDC, pending her removal.

According to the contract, the Multnomah County Sheriff was required to follow federal law. Yet as early as 1995, the Multnomah County jails followed a policy of routinely conducting strip searches on prisoners being transferred in and out of custody, contrary to the INS policy for strip searches. However, Beebe states that he did not review the Multnomah County policy, claims that he was unaware of it, and apparently delegated responsibility to his employees for monitoring the conditions of confinement for those in INS custody. App 115-16 (Beebe Depo, pp. 64-65). Even if Beebe was not actually aware of Multnomah County's blanket strip search policy, as he claims, it could reasonably be inferred that he should have known of it. After all, he is charged with knowledge of

the INS policy prohibiting routine strip searches on detainees by contrractors, and Edenfield, his supervisory detention and deportation officer, freely admitted knowledge of MCDC's blanket strip search policy. Plaintiffs' Ex 28 (Ededfield Depo), pp. 15-16. Even more troubling, Beebe admitted that a blanket strip search policy would not have "concerned" or "bothered [him] a bit" even though it violated the INS policy. App 116 (Beebe Depo), p. 65.

If foreseeability alone suffices, then Beebe could be held liable for the constitutional harm inflicted on Wong even though he was not directly involved in the decision where to detain Wong. Had he not entered into a contract with the Multnomah County Sheriff or had he not turned a blind eye to—or had he even been the least bit concerned about—Multnomah County's blanket strip search policy, then Wong would not have been subjected to strip searches while detained in the Multnomah County jails.

Another court found a causal connection in a similar situation. In *Tungwarara v. United States*, 400 F Supp 2d 1213 (ND Cal 2005), the plaintiff alien was detained by an immigration inspector after she tried to gain admission to the United States. She was then transported to a local detention facility, where she was strip searched pursuant to jail policy. She alleged that the immigration inspector was liable under the Fourth Amendment for causing her detention and unlawful strip search. The inspector was not involved in the decision to detain the alien or where to detain her. However, the inspector had coerced her into withdrawing her application for admission and making

misrepresentations regarding her intent which resulted in a finding that she was a flight risk and should be detained pending removal. The court found that this coercion, combined with undisputed knowledge of the local jail's strip search policy, raised a triable issue of material fact as to whether the inspector's conduct was causally linked to the asserted injury. Unlike the inspector in *Tungwarara*, Beebe had no direct contact with Wong and did not coerce her into making any misrepresentations regarding her intentions. However, the evidence supports the inference that, despite his denial, Beebe participated in the decision to issue the Expedited Removal Order and deny adjustment of status. If he did, then he knew that Wong would be detained as a result, knew that she would likely be transferred to a Multnomah County jail, and should have known of Multnomah County's blanket strip search policy which he condoned. From the standpoint of foreseeability, this appears to be a sufficient causal link to at least raise a triable issue of fact for purposes of summary judgment.

b. Clearly Established Law

Citing *Tungwarara*, Beebe also argues that he is entitled to qualified immunity because Wong had no clearly established right not to be strip searched. After finding that some level of suspicion is required under the Fourth Amendment to conduct strip searches of non-admitted aliens, the court in *Tungwarara* determined at the second step of the qualified immunity analysis that such a right was not clearly established in January 2002. *Id* at 1222-23. The court recognized that prior Ninth Circuit cases had recognized the "unsettled" nature of the case

law regarding the constitutional rights of non-admitted aliens. *Id* at 1220-21, citing *Wong*, 373 F3d at 976; *Barrera-Echavarria v. Rison*, 44 F3d 1441, 1449 (9th Cir) (*en banc*), *cert denied*, 516 US 976 (1995). The court also recognized that previous cases had dismissed claims of improper search and seizure on the ground that such aliens are not afforded due process protections, *see Papa v. United States*, 281 F3d 1004, 1010 (9th Cir 2002), and implied that the text of the Fourth Amendment does not apply to arriving aliens, *see United States v. Verdugo-Urquidez*, 494 US 259, 265 (1990). *Tungwarara*, 400 F Supp 2d at 1221. After distinguishing several cases as not addressing the particular situation of a strip search of a nonadmitted, adult alien at the border, the court then concluded that although:

> a non-invasive strip search of a non-admitted adult alien at the border without *any* suspicion of any kind is unconstitutional, the Court cannot conclude that this right was clearly established at the time of the incident. If the same search had occurred later after the Ninth Circuit's decision in *Wong*, or had been more invasive or abusive at the time, the Plaintiff's "clearly established" rights would likely have been violated. On the uncontested facts of the search here, however, [the inspector] is entitled to qualified immunity.

Id at 1222 (emphasis in original).

Due to inconsistencies in her sworn statement to immigration officials at the port of entry, the plaintiff in *Tungwarara* was deemed a flight risk and not eligible for parole into the country. Wong, on the other hand, was not deemed to be any kind of risk and was readily paroled into

the country pending a deferred inspection. Although she did not appear for the deferred inspection, her attorney gave advance notice with an explanation. There is no suggestion in the record that Wong would flee. Second, the search in *Tungwarara* was described as no more than a "pat down" conducted in private by a female. Wong's search, in contrast, was far more extensive, requiring her to strip naked, bend over for visual inspection of her genital and anal area, in an area that was separated from the public only by a thin curtain, through which Wong could see male staff (and presumably they could see her too), who handed her clothes after the search. These key distinctions render *Tungwarara* factually inapposite.

Furthermore, it is not necessary that the exact conduct be declared unconstitutional before a finding may be made that a right was clearly established. *United States v. Lanier*, 520 US 259, 271 (1997) (involving the Eighth Amendment); *see also*, *Anderson v. Creighton*, 483 US 635, 640 (1987). As the Ninth Circuit has recently noted, "precedent directly on point is not necessary to demonstrate a clearly established right." *Hydrick*, 466 F3d at 690, quoting *Blueford v. Prunty*, 108 F3d 251, 255 (9th Cir 1997). Rather, "[i]f the only reasonable conclusion from binding authority were that the disputed right existed, even if no case had specifically so declared, [Defendants] would be on notice of the right and [officials] would not be qualifiedly immune if they acted to offend it." *Id.*

It was clearly established well before June 1999 that generalized strip searches of persons arrested for minor offenses without reasonable suspicion violate the Fourth Amendment. *Giles v. Ackerman*, 746 F2d 614 (9th Cir

1984), *cert denied*, 471 US 1053 (1985). With respect to incarcerated prisoners, the Fourth Amendment requires searches to be reasonably related to legitimate penological interests. *Michenfelder v. Sumner*, 860 F2d 328 (9th Cir 1988). It also has been clearly established for over 20 years that although routine border searches are allowed, the Fourth Amendment protects aliens seeking admission at the border from unreasonable searches, including strip searches and body-cavity searches. *United States v. Montoya De Hernandez*, 473 US 531, 539 (1985). In particular, it is unconstitutional for INS officers to strip search illegal aliens at the border without a reasonable suspicion that the search will reveal weapons or contraband. *United States v. Gonzalez-Rincon*, 36 F3d 859 (9th Cir 1994), *cert denied*, 514 US 1008 (1995); *also see Flores v. Meese*, 681 F Supp 665, 669 (CD Cal 1988) (finding that INS policy of routinely strip searching juveniles, absent a reasonable suspicion, violates the Fourth Amendment). Also in June 1999, the INS itself prohibited blanket strip searches of persons in INS custody.

In sum, no INS official could have reasonably believed in June 1999 that without violating the Fourth Amendment, someone who presented no cause for suspicion of harboring contraband, who had not been charged with any crime, and who did not pose any risk of flight or danger, could be detained in a jail facility that conducted blanket strip searches.

Accordingly, Beebe is not entitled to summary judgment against the First Claim for violation of the Fourth Amendment on the basis of qualified immunity. However, due to issues of fact as to whether Beebe set in motion the

series of events leading to the strip search of Wong, Wong also is not entitled to summary judgment on this claim.

2. **RFRA (Fourth Claim)**

Wong alleges that the strip searches violated her "lifetime purity vow of celibacy." Fifth Amended Complaint, ¶ 27. However, Wong testified only that she found the searches embarrassing, not that they somehow interfered with or substantially burdened her religious beliefs. App 319-20. This is consistent with the testimony of Dr. Shean Lin Want, a Tien Tao minister, that an involuntary strip search does not violate the Tien Tao vow of celibacy. App 365.

Nevertheless, Wong contends that a reasonable juror could find that Wong's vows of celibacy were substantially burdened by the dehumanizing strip searches to which she was subjected and by her treatment as a common criminal without any basis. This court disagrees. In the absence of any evidence that a strip search somehow violated Wong's religious beliefs, Beebe should be granted to summary judgment against the Fourth Claim alleging a violation of RFRA with respect to the strip searches.

III. **Claim Against the United States for Declaratory Relief (Third Claim)**

Wong[15] contends that she is entitled to declaratory relief that the United States (and its agencies INS or DHS)

---

[15] The Association is also listed as a plaintiff with respect to the Third Claim for declaratory relief. This court previously found that the Association had no standing with respect to the Third Claim.

must allow her to file a motion to reopen the proceedings on her third (April 20, 1999) application for adjustment of status or have the prior decision on that application reconsidered. Fifth Amended Complaint, ¶ 44; *see* 8 CFR § 103.5(a). The United States seeks summary judgment against this claim, contending that it is moot and, even if not moot, it did not improperly deny Wong the opportunity to file such a motion.

A. Whether the Declaratory Relief Claim is Moot

1. Wong's Intent to Live in the United States

The United States argues that this claim is now moot because Wong no longer intends to live in the United States. That argument is based on Wong's deposition testimony that "[s]ince [defense counsel] kept on pressing me about where I intend to stay, I want to tell him it is Hong Kong." App 303. However, due to nuances in the language used by Wong, her testimony is more ambiguous than the written transcript reveals. Immediately following Wong's statement, the interpreter clarified that Wong's testimony was not tense-specific: "THE INTERPRETER: The interpreter wants to add in—

Opinion & Order dated April 26, 2005 (docket #150), p. 7. Moreover, as discussed below, the same regulation that precludes Wong's claim due to the abandonment of her application also operates to preclude the Association's claim. Finally, the reasons which Wong cites for her inability to file her motion for reopening or reconsideration within 30 days (being subjected to expedited removal, detained, and forced to leave the United States, Fifth Amended Complaint, ¶ 42) would not have prevented the Association from filing a motion for reopening or reconsideration.

specifically, this sentence, there is no adverb. So the interpreter does not know the tense, whether this is current or past. The interpreter doesn't know." *Id.* In the context of Wong's other statements on the subject, the deposition does not reflect any lack of intent to live in the United States. App 303-04 ("Tao followers . . . do not have personal agenda . . . [so she] had to go back to where [Qian Ren, predecessor leader of the Association] wanted [her] to be" (App 303) and "I still need to serve my Tao duty. . . . Therefore, I put my mother aside; I put my family aside to follow Qian Ren," (App 304)). To the contrary, it indicates that Wong continues to want to follow the mandate of Qian Ren, namely by "spread[ing] the Tao to the whole world." App 304.

2. **Abandonment of the Adjustment of Status Application**

The United States also argues that the declaratory relief claim is moot because Wong's adjustment application was deemed abandoned when she departed while under removal proceedings. During the relevant time period, federal regulations governing adjustment of status applications provided as follows:

> The departure from the United States of an applicant who is under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of the proceeding by reason of the departure. The departure of an applicant who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, unless the applicant was pre-

viously granted advance parole by the Service for such absence, and was inspected upon returning to the United States.

8 CFR § 245.2(a)(4)(ii) (1999).

Wong argues that this regulation is inapplicable because her third application for adjustment of status had already been denied (App 68-70) as of the date of her departure. Because her application was no longer pending, she reasons that it could not be deemed abandoned. The question is whether a ruling on the merits precludes application of the regulation's presumptive ruling that the applicant has chosen to abandon his or her application. Despite its logical appeal, in this context the argument that a denied application has been ruled on and, therefore, cannot be "abandoned" must be rejected.

The text of the abandonment regulation makes no distinction as to the adjudicatory stage of the adjustment of status application, but simply refers to "the proceeding" involving the application. A ruling on the merits of a particular application does not necessarily terminate a proceeding. Where, as here, the applicant's request for adjustment of status has been denied, he or she might take further action to continue the proceedings, such as filing an appeal or requesting reconsideration. While such actions might constitute grounds for renewing the proceeding, this regulation recognizes that other actions by the applicant might constitute grounds for terminating the proceeding. The issue is whether the regulation only contemplates the abandonment of applications on which no

ruling has yet been issued, or also includes applications that have been denied.

Ambiguities in deportation statutes should be construed in favor of the alien. *Wong*, 373 F3d at 962; *see also Montero-Martinez v. Ashcroft*, 277 F3d 1137, 1141 (9th Cir 2002). When Wong departed the United States on June 22, 1999, an Order of Removal had been signed. App 54. Because Wong was "under . . . removal proceedings" at the time of her departure, her application was deemed abandoned under the first sentence of this regulation. In 2000, the regulation was amended by adding the word "pending" in the second sentence regarding departures by applicants who are not under removal proceedings. 8 CFR § 245.2(a)(4)(ii)(2000); Fed Register Vol 64, No. 104 (June 1, 1999) (" . . . shall be deemed an abandonment of the application constituting grounds for termination of any *pending* application for adjustment of status . . . "). The legislative history gives no hint as to the reason for the addition of that adjective. The amendment of only the second sentence in 2000 evidences an intent to not similarly restrict the first sentence (applicable to Wong) to pending applications. Thus, to the extent legislative history sheds any light on this issue, it tends to favor the interpretation proffered by the INS.

Moreover, construing this regulation to include only to those applications on which no substantive ruling has yet issued is inconsistent with the overall structure of immigration law. Adjustment is a process designed for aliens who are physically present in the United States. *See* 8 USC § 1255(a) & (i). Aliens who are not physically present in the United States and who wish to immigrate must

obtain a visa from a consulate abroad. For an alien who has been removed, adjustment is no longer the appropriate avenue to permanent residence for that alien. Instead, the alien is again eligible to seek an immigrant visa (which, if the alien is eligible for adjustment, should be available already, *see* 8 USC § 1255(a), (i)) and to present herself for inspection as an immigrant. *See* 8 USC § 1181(a).

Thus, when Wong was removed, her departure (though involuntary) resulted in her application for adjustment of status being deemed abandoned and constituted grounds for the termination of the adjustment of status proceeding. Because she was and is outside the United States, she was no longer eligible for adjustment of status. A motion for reconsideration or reopening filed prior to her departure might have renewed the proceeding on Wong's adjustment of status of application. However, once she departed, any motion for reconsideration or reopening could not result in effective relief given her ineligibility. As a result, her claim for declaratory relief is moot, and the United States should be granted summary judgment against the Third Claim.

B. Denial of Opportunity to File Motion

Because a motion to reopen proceedings would be moot, this court need not address the alternative argument made by the United States that it did not improperly deny Wong the opportunity to file such a motion.

IV. Claims Against the United States Under the FTCA (Fifth Claim)

In the Fifth Claim, Wong alleges that the United States is liable under the FTCA for the torts of: (1) false imprisonment; (2) invasion of privacy; and (3) negligence. In addition, the Association alleges that a FTCA claim against the United States for negligence.[16]

A. False Imprisonment Claim Barred by Prior Rulings

False imprisonment has been specified as part of plaintiffs' FTCA claim(s) since the filing of the Second Amended Complaint (docket #83) over four years ago. However, three years after that tort specification emerged, the parties filed cross-motions for summary judgment on the false imprisonment claim.[17] After carefully considering

---

[16] At oral argument on these motions, counsel for plaintiffs clarified that the only portion of the Fifth Claim pertaining to the Association is that portion sounding in negligence. Specifically, the Association contends that it was a "quasi-applicant" regarding Wong's application for adjustment of status and that, to the extent Wong was not provided proper notice of her rights when that application was denied, the Association has a claim co-extensive with the claim brought by Wong. Thus, this court considers only that portion of the negligence claim with respect to the Association and deems all remaining claims as brought by Wong only.

[17] *See* Plaintiff Kwai Fun Wong's Motion for Partial Summary Judgment Against Defendant United States (docket #192) and United States' Cross Motion for Partial Summary Judgment on Plaintiff Kwai Fun Wong's False Imprisonment Claim (docket #206).

the merits of those motions, this court concluded that, although the FTCA claim(s) were timely filed, this court lacked subject matter jurisdiction over the false imprisonment portion of the FTCA claim under 8 USC § 1252(a)(2)(A)(i): "The core of [the false imprisonment] claim and [Wong's] arguments is that no expedited removal order should have been entered against Wong. However, this court lacks jurisdiction to entertain such an argument." Findings and Recommendation dated February 14, 2006 (docket #325) ("February 14, 2006 F&R"), pp. 9-15, adopted by Order dated April 10, 2006 (docket #358). This court allowed that Wong might be able to allege some tort claim other than false imprisonment premised upon the manner (as opposed to the fact) of her detention (*id* at 15-16). However, the false imprisonment claim only contests the fact, not the manner, of her imprisonment. This court sees no basis for review of that prior decision at this juncture.

Accordingly, to the extent Wong seeks summary judgment on the false imprisonment specification of the Fifth Claim under the FTCA, the United States' motion for summary judgment should be granted and Wong's motion should be denied.

B. Legal Standards Governing Remaining FTCA Claims

This court next turns to the FTCA claims alleging invasion of privacy and negligence. The FTCA provides a limited waiver of sovereign immunity for certain torts committed by federal employees acting within the scope of their employment. Specifically, the "United States shall

be liable . . . in the same manner and to the same extent as a private individual under like circumstances" would be liable under the law of the state "where the act or omission occurred." 28 USC §§ 1346(b) & 2674. The universe of cognizable claims under the FTCA is limited by a variety of exceptions which "are to be strictly construed. If the asserted liability falls within an exception to the FTCA, then the claims must be dismissed for lack of subject matter jurisdiction." *Bibeau v. Pac. Northwest Research Found., Inc.*, 339 F3d 942, 945 (9th Cir 2003) (citations omitted). Here, the United States argues that plaintiffs' FTCA claims are barred by operation of the independent contractor and misrepresentation exceptions. 28 USC §§ 2671 & 2680(h).

If a claim is not barred by an exception, then it cannot be premised on a violation of federal law; instead, "plaintiffs must show that the conduct of the government violates some state law." *Delta Sav. Bank v. United States*, 265 F3d 1017, 1025 (9th Cir 2001), *cert denied* 534 US 1082 (2002). Moreover, even where uniquely governmental functions are at issue, the FTCA waives sovereign immunity only where local law would make a private person liable in tort, not where local law would make state or municipal entities liable. *United States v. Olson*, 546 US 43, __, 126 SCt 510, 512-13 (2005) (abrogating line of Ninth Circuit decisions to the contrary). Where such uniquely governmental functions are at issue, the court's role is to determine whether any private person analogy for the particular kind of governmental task at issue provides a basis for liability. *Id*, 126 SCt at 513.

C. **Conditions of Confinement: Independent Contractor Exception**

Two of the remaining tort claims alleged by Wong are premised, at least in part, upon the conditions of confinement she endured in the Multnomah County jails. Both her invasion of privacy claim and a portion of her negligence claim are premised on her contention that the United States must answer for the strip searches she endured while in detention. In addition, her negligence claim is premised upon her contention that the United States failed to ensure that she received the diet mandated by her religion while housed at MCDC. The United States contends that these assertions are outside the scope of its liability under the FTCA because they are barred by the independent contractor exception. This court disagrees to the extent that Wong's claims are premised upon negligence of the INS as separate from the negligence of Multnomah County.

Subject to enumerated exceptions, the United States may be held liable for the negligent or wrongful act or omission of any "employee of the Government while acting within the scope of his office or employment." 28 USC § 1346(b)(1). However, an "employee of the Government . . . does not include any contractor with the United States." 28 USC § 2671. Under this "independent contractor" exception to FTCA, the "critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the detailed physical performance and day to day operations of the contractor." *Hines v. United States*, 60 F3d 1442, 1446

(9th Cir 1995) (citations and internal quotation marks omitted).

The United States argues that Multnomah County, which operated the jails where Wong was detained, was an independent contractor. As a result, the United States contends that it is not liable for Wong's invasion of privacy claim and any part of her negligence claim premised upon the strip searches and failure to provide meals adequate to meet her religious needs. However, the independent contractor exception does not cut this wide a swath.

In *Logue*, "the Supreme Court held that the government was not liable for the negligent acts of an independent contractor running a jail, but did not rule out liability based on the negligent acts of the Government's employees in placing the inmate in the care of the contractor." *Sandoval v. United States*, 980 F2d 1057, 1059 (9th Cir 1993); *see also Berkman v. United States*, 957 F2d 108, 114-15 (4th Cir 1992).

With regard to the strip searches, Wong alleges that government employees were negligent in placing her in Multnomah County jails because the United States knew or should have known that she would be subjected to strip searches. Her claims hinge largely on the United States' failure to protect her from the blanket requirement of strip searches of inmates prior to changes in housing assignments from reception or when transferred to another Multnomah County facility. As in *Logue*, Wong alleges negligence by the United States separate and apart from the negligence of Multnomah County in operating its detention facilities.

Similarly, the record supports the conclusion that prior to placing Wong in the custody of Multnomah County, INS officials were told that she needed a "vegetarian" diet for religious reasons. Although the evidence indicates that Li (who communicated that information) and Godfrey (to whom Li communicated that information) may have had a differing understanding of the specific type of "vegetarian" meals that Wong's religious vows required, it is clear that the fact that the request was religiously based was communicated to employees of the United States. There is also evidence that INS officials later were told that Wong was not receiving meals which complied with the mandates of her religion. Based on that evidence, Wong alleges that, both before and after they placed her in Multnomah County's custody, employees of the United States failed to convey to Multnomah County that her need for a "vegetarian" diet was religiously based. As a consequence, Multnomah County took no action to inquire into Wong's religiously based dietary needs.

The only evidence in the record indicates that Multnomah County had a policy of accommodating dietary requests that were religiously or medically based. Wong alleges that, due to the failure of the INS to convey the information it had received, *i.e.* that her request for "vegetarian" food was religiously based, the exact parameters of Wong's religiously based dietary restrictions were never considered by Multnomah County. In short, the specifications of negligence are geared at negligent acts by the INS separately from negligent acts by Multnomah County and, thus, fall outside the independent contractor exception.

D. Invasion of Privacy

The second tort identified by Wong in connection with her FTCA claim is invasion of privacy. As discussed above, the independent contractor exception to the FTCA does not bar this claim. Thus, the issue is whether Wong can show that a "private individual under like circumstances" would be liable under Oregon law. 28 USC §§ 1346(b) & 2674.

In general, the tort of invasion of privacy "protects the right of a plaintiff 'to be let alone.'" *Mauri v. Smith*, 324 Or 476, 482, 929 P2d 307, 310 (1996), quoting *Humphers v. First Interstate Bank*, 298 Or 706, 714, 696 P2d 527, 531 (1985). Under this "umbrella" tort, four separate theories support a claim: "(1) intrusion upon seclusion; (2) appropriation of another's name or likeness; (3) false light; and (4) publication of private facts." *Id* (citations omitted). To establish a claim under a theory of intrusion upon seclusion, plaintiff must prove three elements: "(1) an intentional intrusion, physical or otherwise, (2) upon the plaintiff's solitude or seclusion, or private affairs or concerns, (3) which would be highly offensive to a reasonable person." *Id.*

It is undisputed that Wong was strip searched twice. The record reveals no facts supporting the inference that the reasons supporting Wong's detention or her behavior while in detention justified such a search. Moreover, there is no dispute that such a search amounts to a severe invasion of privacy without invitation, permission or welcome. *Kennedy v. Los Angeles Police Dept.*, 901 F2d 702, 711 (9th Cir 1989) ("the intrusiveness of a body cavity

search cannot be overstated."); *also see Helton v. United States*, 191 F Supp 2d 179, 182-83 (D DC 2002) (plaintiffs stated a claim for intrusion upon seclusion based on their allegations of a strip and squat search ordered by the United States Marshals Service).

However, this claim suffers from a fatal flaw in that no official of the United States actually conducted the strip searches of Wong. At best, the United States selected Multnomah County jails as detention facilities without ensuring that Multnomah County did not perform blanket strip searches of INS detainees. That may give rise to a negligence claim, as discussed next, but not to an invasion of privacy claim against the United States which requires an intentional act. Thus, the United States is entitled to summary judgment against the invasion of privacy portion of the Fourth Claim.

E. Negligence

Finally, both plaintiffs allege a claim for negligence against the United States under the FTCA. For the reasons that follow, this court concludes that the Association's claim is barred and that only Wong's assertions that the United States was negligent in making arrangements for her detention survives summary judgment.

1. Association's Claim Barred by Economic Loss Rule

As discussed above, the Association contends that it was the "quasi-applicant" regarding Wong's application for adjustment of status because it filed the petition for an immigration visa (Form I-360) upon which Wong's request for adjustment of status is based. It is questionable

whether the Association has standing to bring this claim. Even assuming the Association has standing, its negligence claim is nevertheless barred by Oregon's economic loss rule.

The Second, Third, and Fourth Amended Complaints each alleged an FTCA claim by both Wong and the Association for false imprisonment, intentional interference with economic relations, and negligence. Second Amended Complaint (docket #83), ¶¶ 50-52; Third Amended Complaint (docket #110), ¶¶ 46-48; Fourth Amended Complaint (docket #170), ¶¶ 46-48. The bodies of those pleadings each alleged that the Association suffered both economic and noneconomic damages. Second Amended Complaint (docket #83), ¶¶ 29-31; Third Amended Complaint (docket #110), ¶¶ 25-27; and Fourth Amended Complaint (docket #170), ¶¶ 25-27. The prayers for damages were ambiguous as to whether Wong, the Association, or both, sought non-economic damages on the FTCA claim. Second Amended Complaint, ¶ 51; Third Amended Complaint, ¶ 47; and Fourth Amended Complaint, ¶ 47. However, in opposing defendants' motion against the "religious schism" claims, plaintiffs maintained that the Association's damages claims under the RFRA and the FTCA were strictly economic in nature:

> [U]nder the Federal Tort Claims Act ("FTCA"), Plaintiff Wong seeks non-economic damages against the United States arising out of its negligence and false imprisonment of her. . . . Also, under the FTCA, both plaintiffs allege an intentional interference with economic relations arising out of Plaintiff Wong's arrest, imprisonment, disassociation from the Association

and its members, strip search, and denial of the food mandated by her diet.

Corrected Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment on Plaintiff's RFRA and Religious Schism Claims (docket #257), p. 18.

THE COURT: All right. Well, let me hear the plaintiffs' response to this religious schism issue.

MR. STEENSON: Briefly, your Honor.

* * *

Here's—here's what we view the claim by the Association to be, under RFRA. And that is simply for the loss of membership, and a loss of corresponding donations. Obviously the Association is not entitled to non-economic damages, and their claim is going to be restricted to an economic claim. And I didn't mean to leave out the FTCA, but likewise the FTCA.

THE COURT: Actually, I'm glad you clarified that, because that was one question I had. It appeared to me the Association could only have economic damages.

MR. STEENSON: Exactly.

Second Supplemental App 475-76 (Transcript of Court Proceedings December 20, 2005) (docket #268); *See also*, Findings and Recommendation dated January 10, 2006 (docket #287), pp. 10-11 and n5, adopted by Order dated February 21, 2006 (docket #332); *see also* App 418-19.

In the Fifth Amended Complaint, plaintiffs realleged a claim under the FTCA. In doing so, plaintiffs dropped the portion of FTCA claim based on intentional interfer-

ence with economic relations, kept the portion of the claim based on the torts of false imprisonment and negligence, and added invasion of privacy. Fifth Amended Complaint, ¶ 49. As do the Second, Third, and Fourth Amended Complaints, the allegations of the Fifth Amended Complaint allege both economic and non-economic injury to the Association (*id* at ¶¶ 29-31) and the prayer for the Fifth Claim is ambiguous as to what damages each plaintiff seeks: "Plaintiffs are entitled to separate awards of economic and non-economic damages against Defendant United States in an amount to be determined at trial." *Id* at ¶ 50.

The Association alleges no personal injury or damage to personal property. Based on the history of this claim, it is evident that the Association seeks only economic damages related to the Fifth Claim under the FTCA, regardless of the nature of the alleged underlying tort. During oral argument on the pending motions, plaintiffs reiterated that they still intend to pursue a negligence claim on behalf of the Association under the FTCA. However, such a claim must be based on a viable state law claim. In Oregon, "[w]hen a claim based on negligence seeks recovery for economic damages only, the claim must be predicated on some duty of the negligent actor to the injured party beyond the common-law duty to exercise reasonable care to prevent foreseeable harm." *Lewis-Williamson v. Grange Mut. Ins. Co.*, 179 Or App 491, 493, 39 P3d 947, 949 (2002), citing *Onita Pac. Corp. v. Trustees of Bronson*, 315 Or 149, 159, 842 P2d 890, 896 (1992). Specifically, the plaintiff must allege and prove that the defendant had some relationship to the plaintiff which

gave rise to a duty to protect the economic interests of the plaintiff:

> [T]o recover purely economic losses, a plaintiff must plead some source of duty outside of the common law of negligence. Such a duty arises only in attorney-client, architect-client, agent-principal, and similar relationships where the professional owes a duty of care to further the economic interests of the "client." . . . [A] particular source for the duty to protect from economic losses is required even if economic losses are a foreseeable consequence of a defendant's conduct. Thus, a plaintiff must first show the *existence* of a special relationship in which the defendant had some obligation to pursue the plaintiff's economic interests. Only then does [the] foreseeability analysis come in to play.

Roberts v. Fearey, 162 Or App 546, 549-50, 986 P2d 690, 692-93 (1999) (citations omitted; emphasis in original).

The Association fails to allege or to submit evidence of any special relationship with the United States which would prevent application of the economic loss rule. To the contrary, the only special relationship invoked in this case is that of a prisoner and guard. That relationship may well affect Wong's FTCA claims, but has no bearing on any FTCA claim by the Association. Instead, the only relevant relationship between the United States and the Association was that of a government (through its agency) adjudicating a petition for an immigrant visa. Such a relationship is not analogous to the types of relationships discussed in *Roberts* and imposes no duty to protect from economic harm. Accordingly, this court concludes that

the Association's negligence claim—to the extent any such claim is alleged in the Fifth Amended Complaint—is barred. This leaves for consideration only the negligence claim alleged by Wong.

2. Wong's Specifications of Negligence

The Fifth Claim (Fifth Amended Complaint, ¶¶ 49-51) does not expressly identify the actions or failures which form the basis of Wong's negligence claim. However, in response to the United States' motion for summary judgment, Wong asserts that the INS was negligent in:

(1) sending the employment authorization letter (some time prior to June 10, 1999);

(2) selecting MCDC for detention of those it arrested and detained;

(3) failing to take reasonable steps to ensure that she received vegetarian meals as required by her religious vows in light of the INS's knowledge that she needed such meals;

(4) denying her third adjustment of status application; and

(5) misstating her rights to review when issuing her application for adjustment of status denial letter.[18]

---

[18] In Plaintiff's Response to the United States' First Set of Interrogatories, Wong also alleged that the United States was negligent in failing to follow the legal opinion of the INS Office of General Counsel and in failing to properly investigate Wong's claims to religious worker status, as well as the circumstances surrounding her

As these specifications reveal, the negligence claim is based on three categories of conduct on the part of the INS, namely: (1) sending Wong letters regarding immigration proceedings which contained misstatements; (2) making arrangements for Wong's detention (choosing MCDC as the detention facility and simultaneously failing to ensure adequate constitutional safeguards); and (3) adjudicating Wong's adjustment of status application. For the reasons that follow, this court concludes that only the allegations of negligence with respect to making arrangements for Wong's detention survive summary judgment.

Government bodies in Oregon can be liable for negligence with respect to the manner in which their law enforcement personnel discharge their duties and responsibilities. *McAlpine* v. *Multnomah County*, 166 Or App 472, 482-83, 999 P2d 522, 528 (2000), *rev den* 336 Or 60, 77 P3d 635 (2003).

a. **Claims Regarding Letters Barred by Misrepresentation Exception**

The FTCA excludes from its reach "[a]ny claim arising out of . . . misrepresentation. . . ." 28 USC § 2680(h). This misrepresentation exception "shields

---

claim to that status. App 404-05. However, Wong does not raise those specifications of negligence in her briefing on the present motions, and does not counter the reasons given by the United States for granting summary judgment against those specifications of negligence. Thus, this court assumes that Wong has abandoned resort to those specifications as a basis for her negligence claim.

government employees from tort liability for failure to communicate information, whether negligent, or intentional." *Lawrence v. United States*, 340 F3d 952, 958 (9th Cir 2003), citing *United States v. Neustadt*, 366 US 696, 705-06 (1961). "[A] negligent failure to inform, without more, is misrepresentation within the meaning of 28 USC § 2680(h). 'The intent of the section is to except from the [FTCA] cases where mere "talk" or failure to "talk" on the part of a government employee is asserted as a proximate cause of the damage sought to be recovered from the United States.'" *City and County of San Francisco v. United States*, 615 F2d 498, 505 (9th Cir 1980), quoting *Nat'l Mfg. Co. v. United States*, 210 F2d 263, 276 (8th Cir), *cert denied*, 347 US 967 (1954).

Wong alleges that, in violation of INS policy and with the intent to remove her from the United States, the INS "issued a deceitful letter . . . inducing Wong to appear at the Portland INS Office . . . purportedly to receive her Employment Authorization Card." Fifth Amended Complaint, ¶ 17. Wong also alleges that she was "not provided with correct or timely information on her right to appeal her adjustment of status denial and request a hearing before an administrative law judge," despite defendants' "mandatory obligation to correctly and timely inform [her] of her rights." *Id* at ¶ 23. Wong's response to the United States' motion on this subject clarifies that she claims the INS "was negligent in assessing and communicating Ms. Wong's rights of review for the denial of her application for adjustment of status." Plaintiffs' Corrected Memorandum in Opposition to United States Motion for Summary Judgment (docket #421),

p. 15. Each of these allegations challenges the communication of allegedly false or misleading information by the INS to Wong, namely that she could pick up employment authorization documents and that she had no right of review of the denial of her request for adjustment of status.

Wong asserts that the misrepresentation exception does not bar these claims, citing the "operational tasks" distinction:

> Courts have had difficulty determining whether a claim is one for misrepresentation. The concept is slippery; "any misrepresentation involves some underlying negligence" and "any negligence action can be characterized as one for misrepresentation because anytime a person does something he explicitly or implicitly represents that he will do the thing non-negligently." *Guild v. United States*, 685 F2d 324, 325 (9th Cir 1982). To determine whether the claim is one of misrepresentation or negligence the court examines the distinction between the performance of operational tasks and the communication of information. The Government is liable for injuries resulting from negligence and performance of operational tasks even though misrepresentations are collaterally involved.

Mundy v. United States, 983 F2d 950, 952 (9th Cir 1993), quoting *United States v. Fowler*, 913 F2d 1382, 1387 (9th Cir 1990).

Rather than asserting injury from the information communicated in its employment authorization letter, Wong bases her claim on the act of sending the letter it-

self. However, unlike *Mundy*, which involved the "operational task" of an allegedly negligent denial of a security clearance and the subsequent communication of that denial to plaintiff's employer, Wong's claim turns on the information communicated or omitted. The employment authorization letter communicated information which induced her to appear, and the letter denying her request for adjustment of status omitted to mention the regulation (8 CFR § 103.5(a)) allowing a motion for reopening or reconsideration.

The difficulty in this case is that Wong, as did the plaintiff in *Gen. Pub. Util. Corp. v. United States*, 551 F Supp 521 (ED Pa 1982), alleges claims that are best described as a "hybrid" case falling somewhere in between two distinct lines of Supreme Court cases, namely *United States v. Neustadt*, 366 US 696 (1961), and *Indian Towing v. United States*, 350 US 61 (1955):

> The initial issue [in applying the misrepresentation exception is] one of characterization. Does the complaint at bar sound in "negligent misrepresentation" or "negligence"? The inquiry is a difficult one and conflicts between decided cases are not subject to facile resolution.
>
> [*Neustadt* and *Indian Towing*] highlight the conflicting lines of authority.
>
> * * *
>
> The case at bar actually represents a hybrid case falling somewhere between *Neustadt* and *Indian Towing*. The *Indian Towing* line of cases usually involves the negligent "operational control" of the harm-causing in-

strumentality. Damages generally are expressed in terms of personal injury or loss of property. The cases which follow *Neustadt* concern governmental transmission of information which results in damages flowing from commercial decisions based thereon. Under *Neustadt*, there is no "operational control" and frequently no liability. In the case at bar, we have the element of the transmittal of false information coupled with the *Indian Towing* element of property damage.

Relying on *Neustadt*, Wong argues that the misrepresentation exception bars only those claims for damages resulting from commercial decisions based upon false or inadequate information provided by the government. However, the statutory language does not support this restriction. Instead, "[*a*]*ny claim* arising out of . . . misrepresentation" is barred by this exception. 28 USC 2680(h) (emphasis added). The cases patterned after *Neustadt* may have arisen in the commercial context, as a result of which "[c]ourts have interpreted this exception to bar claims arising from commercial decisions based on false or inadequate information provided by the government." *Frigard v. United States*, 862 F2d 201, 202 (9th Cir 1988), *cert denied*, 490 US 1098 (1989) (citations omitted). However, it is equally accurate that courts, including the Ninth Circuit, have applied the misrepresentation exception in cases involving personal injuries.

In *Lawrence v. United States*, 340 F3d 952 (9th Cir 2003), the juvenile female plaintiff was sexually abused by a felon in a witness security program. The felon was employed at a group home where the plaintiff was a resident and was also placed into the felon's care as his foster

child. Among other claims, the plaintiff brought a claim under the FTCA, alleging that two federal officials had failed to provide complete and accurate information at the exemption hearing at which the felon was seeking to pursue employment at the group home. The Ninth Circuit affirmed dismissal of the FTCA claim based on application of both the discretionary function and the misrepresentation exception.

Cases in other districts have reached the same conclusion that the misrepresentation exception applies to personal injury claims, as well as to claims for financial loss. "Despite the language of *Neustadt* that describes the traditional tort of misrepresentation involving 'economic affairs,' the misrepresentation exception of the FTCA has been applied to claims involving personal injury." *Russ v. United States*, 129 F Supp2d 905, 909 (MD NC 2001) (citing cases).

This court discerns no meaningful distinction between the basis of the claim in *Lawrence* and the basis of Wong's claim. Both cases allege personal injury (sexual assault of Lawrence; invasive strip searches of Wong)[19] resulting from allegedly false (employment documents) or incom-

---

[19] The "injury" attributable to the failure to inform Wong of her right to request reopening or reconsideration is somewhat more difficult to categorize. Wong contends that the failure to notify her of her right to request reopening or reconsideration denied her the right to such review. Whatever the nature the injury, however, it is barred by the misrepresentation exception because Wong alleges no facts which place her claim outside the scope of the misrepresentation exception.

plete (failure to cite regulation granting right to request reopening or reconsideration) information provided by the United States. Based on the broadly-worded text of the misrepresentation exception, as well as on *Lawrence* and cases from other courts applying the exception in the personal injury context, this court concludes that the misrepresentation exception bars Wong's claims for the United States' actions of sending both the employment authorization letter (Fifth Amended Complaint, ¶ 17), as well as the letter denying her request for adjustment of status (*id* at ¶¶ 18, 23-24).

b. Arranging for Wong's Detention

Two specifications of negligence identified by Wong relate to the United States' action of making arrangements for her detention. First, Wong alleges that by selecting Multnomah County jails as a detention facility, the INS subjected her to undue intrusion and harm and a violation of her Fourth Amendment rights while in its custody and control. Second, Wong alleges that after receiving complaints that she was not provided vegetarian meals, the United States did nothing to ensure that her First Amendment rights were not violated. As discussed above, the independent contractor exception does not bar these specifications to the extent they allege negligence separate and apart from the negligence of Multnomah County.

i. Selecting MCDC as the Detention Facility

Multnomah County had a written policy of strip searching all persons arriving at its detention facilities

which violated the INS' own policy barring strip searches. At least one INS official (Edenfield) knew of that policy. Thus, it was foreseeable that Wong would be detained at a Multnomah County jail where a degrading and unlawful strip search was inevitable. Although the INS did not control the day-to-day operations of the Multnomah County jails, it placed her in the care of Multnomah County with knowledge that it did not comply with federal law regarding strip searches of INS detainees. By not ensuring that INS detainees were properly treated, the United States could be held negligent for allowing Wong to be subject to an invasion of privacy by Multnomah County. *See Sandoval*, 980 F2d at 1059.

ii. **Vegetarian Meals**

Similarly, it was foreseeable that the failure to communicate the fact that Wong's request for a "vegetarian" diet was religiously-based would result in Multnomah County failing to provide her with a diet that met the strictures of her religious beliefs. As discussed above, Beebe cannot be held liable for any constitutional violation because Multnomah County had a policy that would have met Wong's religiously-based dietary needs after detention and because he was unaware of any facts that Wong was not receiving the diet she requested. However, this claim is premised not only on Beebe's conduct, but also on the conduct of other INS employees, namely Godfrey and Horne. They were aware that Wong's dietary needs were religious, but failed to communicate the religious nature of her dietary requests to Multnomah County. That failure is a sufficient basis to support a negligence claim.

c. **Adjudicating Wong's Adjustment of Status Application**

Wong's final specification of negligence alleges that the INS negligently adjudicated her application for adjustment of status. Specifically, Wong contends that the INS was negligent in failing to contact her or her attorneys, failing to interview her concerning the factual predicate of her application, making assumptions about her motives in coming to and departing the United States and her place of residence, improperly considering an inadmissibility determination that was based on the false premise that she did not have a valid visa, and refusing to accept her attorney's conclusions about Wong's eligibility to adjust her status.

The problem with this claim is the lack of any analogous liability on the part of private persons under Oregon law. As recognized in *C.P. Chem. Co., Inc. v. United States*, 810 F2d 34, 37 (2d Cir 1987), "[a]s to certain governmental functions, the United States cannot be held liable, for no private analog exists." Thus, "quasi-legislative or quasi-adjudicative action by an agency of the federal government is action of the type that private persons could not engage in and hence could not be liable for under local law." *Id*, quoting *Jayvee Brand v. United States*, 721 F2d 385, 390 (DC Cir 1983). A private person could not be liable for negligently denying an application for adjustment of status. This forecloses any FTCA claim premised upon negligence in adjudicating Wong's adjustment of status application.

Moreover, assuming Wong could overcome this hurdle, she has not identified any state-law duty, the breach of which would give rise to a claim in this context. She has failed to establish the existence, source, or nature of any applicable standard of care governing such a claim, relying instead on allegations that the INS acted "below the standard of care" in adjudicating her application for adjustment of status. In the absence of a duty of care in Oregon applicable to private parties, this claim falls.

Finally—and perhaps most fatally—the INA precludes review of both the inadmissibility determination and the removal order. 8 USC §§ 1252(a)(2)(A) and 1225(b)(1)(A)(i). Thus, even were Wong able to identify a private party analog and articulate an applicable standard of care, defendants would nonetheless be entitled to summary judgment against any claim premised on negligence in adjudicating Wong's adjustment of status application.

RECOMMENDATIONS

For the reasons set forth above, plaintiff Wong's Motion for Partial Summary Judgment Against the Defendants David V. Beebe and the United States of America (docket #400) should be DENIED; defendant David Beebe's Motion for Summary Judgment (docket #403) should be GRANTED IN PART and DENIED IN PART; and defendant United States' Motion for Summary Judgment (docket #405) should be GRANTED IN PART AND DENIED IN PART as follows:

First Claim (Fourth Amendment):

Deny summary judgment both to Wong and Beebe as to whether the strip searches violated the Fourth Amendment

Second Claim (First Amendment):

Grant summary judgment to Beebe

Third Claim (Declaratory Judgment):

Grant summary judgment to the United States

Fourth Claim (RFRA):

Grant summary judgment to Beebe and deny summary judgment to Wong

Fifth Claim: (FTCA)

False Imprisonment: Grant summary judgment to the United States and deny summary judgment to Wong

Invasion of Privacy: Grant summary judgment to the United States and deny summary judgment to Wong

Negligence:

Grant summary judgment to the United States against the Association as to all specifications;

Grant summary judgment to the United States against Wong and deny summary judgment to Wong as to sending letters containing misstatements and adjudicating adjustment of status application;

Deny summary judgment to the United States against Wong and deny summary judgment to Wong as to conditions of confinement.

As a result, the only remaining claims for trial are Wong's First Claim (Fourth Amendment) against Beebe concerning the strip searches and the portion of Wong's Fifth Claim (FTCA) alleging negligence by the United States based on the conditions of confinement.

SCHEDULING ORDER

Objections to this Findings and Recommendation, if any, are due February 12, 2007. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

DATED this 24th day of Jan., 2007.

/s/ JANICE M. STEWART
JANICE M. STEWART
United States Magistrate Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-36136
D.C. No. 3:01-cv-00718-JO

KWAI FUN WONG; WU-WEI TIEN TAO ASSOCIATION,
PLAINTIFFS-APPELLANTS

v.

DAVID BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (N.K.A. DEPARTMENT OF HOMELAND SECURITY) OFFICIAL; UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

Jan. 3, 2013

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3.

APPENDIX L

1. 28 U.S.C. 1346(b)(1) provides:

United States as defendant

* * * * *

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2401 provides:

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

3. 28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not

reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

4. 28 U.S.C. 2679(d) provides:

Exclusiveness of remedy

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or pro-

ceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be sub-

ject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

OPPOSITION BRIEF

RECORD AND BRIEFS

No. 13-1074

SUPREME COURT, U.S.
FILED
MAY - 7 2014

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KWAI FUN WONG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

TOM STEENSON
P.O. Box 820207
Portland, OR 97282
(971) 645-6625

BETH CREIGHTON
CREIGHTON & ROSE, P.C.
815 S.W. Second
Suite 500
Portland, OR 97204
(503) 221-1791

Counsel for Respondent

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Statement 1

Introduction 8

I. There Is No Circuit Conflict Regarding The Availability of Equitable Tolling of The Six-Month Suit-Filing Limitations Period 11

II. The Question Presented Is Not of Sufficient Practical Importance To Warrant Review by This Court 25

III. The Ninth Circuit Correctly Concluded That The Six-Month Suit-Filing Deadline Is Subject To Equitable Tolling 29

IV. This Case Should Not Be Consolidated With *United States v. June* 32

Conclusion 35

TABLE OF AUTHORITIES

Page

CASES

Adkins v. United States, 896 F.2d 1324 (11th Cir. 1990) 22

Allgeier v. United States, 909 F.2d 869 (6th Cir. 1990) 21

Anderberg v. United States, 718 F.2d 976 (10th Cir. 1983) 22

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 21

Arteaga v. United States, 711 F.3d 828 (7th Cir. 2013) 24

Bazzo v. United States, 494 Fed.Appx. 545 (6th Cir. 2012) 19

Bazzo v. United States, 2011 WL 2601009 (E.D.Mich. June 30, 2011) 19

Benge v. United States, 17 F.3d 1286 (10th Cir. 1994) 11, 12, 26, 27

Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1991) 28

Charlton v. United States, 743 F.2d 557 (7th Cir. 1984) 22

Glarner v. U.S. Dep't of Veterans Admin., 30 F.3d 687 (6th Cir. 1994) 18, 19, 20

Gonzalez v. Thaler, 132 S.Ct. 641 (2012) 21

Gonzalez-Bernal v. United States, 907 F.2d 246 (1st Cir. 1990) 22

TABLE OF AUTHORITIES – Continued

Page

Gould v. U.S. Dep't of Health & Human Services, 905 F.2d 738 (4th Cir. 1990) 22

Hedges v. United States, 404 U.S. 744 (3d Cir. 2005) 24

Henderson v. Shinseki, 131 S.Ct. 1197 (2011)..... 21

Hughes v. United States, 263 F.3d 272 (3d Cir. 2001) 24

In re "Agent Orange" Product Liability Litigation v. Dow Chemical Co., 818 F.3d 210 (2d Cir. 1987)..... 21

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990).....*passim*

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008).....*passim*

June v. United States, 2013 WL 6773664 (9th Cir. Dec. 24, 2013)..... 13

Klehr v. A.O. Smith Corp., 521 U.S. 170 (1997)..... 28

Kokotis v. United States Postal Service, 223 F.3d 275 (4th Cir. 2000)..... 23, 24

Kontrick v. Ryan, 540 U.S. 443 (2004)..... 21

Mann v. United States, 399 F.2d 672 (9th Cir. 1968) 22

Marley v. United States, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009).....*passim*

Perez v. United States, 167 F.3d 913 (5th Cir. 1999) 23, 24

TABLE OF AUTHORITIES – Continued

Page

Peterson v. United States, 694 F.2d 943 (3d Cir. 1982) 22

Rakes v. United States, 442 F.3d 7 (1st Cir. 2006) 15

Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) 21

Rogers v. United States, 675 F.2d 123 (6th Cir. 1982) 19

Sanchez v. United States, 740 F.3d 47 (1st Cir. 2014) 17

Santos v. United States, 559 F.3d 189 (3d Cir. 2009) 23, 24

Schmidt v. United States, 901 F.2d 680 (8th Cir. 1990) 22

Sexton v. United States, 832 F.3d 629 (D.C.Cir. 1987) 22

Simon v. United States, 244 F.2d 703 (5th Cir. 1957) 22

Soriano v. United States, 352 U.S. 270 (1957) 32

Sykes v. United States, 2011 WL 3739017 (S.D.Ohio July 22, 2011) 19

T.L. v. United States, 443 F.3d 956 (8th Cir. 2006) 15, 16, 23, 24

United States v. June, No. 13-1075 ..... 32, 35

United States v. Kubrick, 444 U.S. 111 (1979) 22, 28

TABLE OF AUTHORITIES – Continued

Page

Waltz v. United States, 132 S.Ct. 107 (2011).....*passim*

Wisniewski v. United States, 353 U.S. 901 (1957)..... 18

STATUTES AND RULES

28 U.S.C. § 2401(b).....*passim*

28 U.S.C. § 2679 ..... 28, 34

Federal Tort Claims Act.....*passim*

Federal Rules of Civil Procedure, Rule 15..... 22

Tucker Act..... 31

BRIEFS

Brief of Appellee, *T.L. v. United States* 24

Brief for Appellee United States, *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 646 F.3d 185 (5th Cir. 2011) 24

Brief for Defendant-Appellee United States of America, *Santos v. United States* 23

Brief for Defendant Appellee, *Marley v. United States*, No. 06-36006 (9th Cir.) 16

Brief for Respondents in Opposition, *Waltz v. United States*, No. 10-1436 .....*passim*

Brief of Appellee, *Kokotis v. United States Postal Service* 23

Brief of Appellee, *Perez v. United States*.....23

TABLE OF AUTHORITIES – Continued

Page

Brief of the United States in Opposition, *Marley v. United States* 10, 12, 13, 33

Brief of the United States, *Arteaga v. United States* 24

Brief for the United States, *Bazzo v. United States,* 494 Fed.Appx. 545 (6th Cir. 2012).....24

Brief for the United States, *Jackson v. United States*, No. 13-1243 (6th Cir.) 19

Petition for a Writ of Certiorari, *Marley v. United States*, No. 09-270 8

Supplemental Brief for Appellee, *June v. United States*, No. 11-17776 (9th Cir.).....13, 34

OTHER AUTHORITIES

1993 Advisory Committee Note, subdivision m, Rule 4 of the Federal Rules of Civil Procedure.....27

STATEMENT

The Federal Tort Claims Act (FTCA) provides an action against the United States for certain torts committed by federal officials. Section 2401(b) contains two separate statutes of limitations. First, a claim must be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). Second, any action must be "begun within six months after the date of mailing ... of final denial of the claim by the agency to which it was presented." *Id.* The question presented in the instant case is whether the six-month suit-filing limitations period is subject to equitable tolling. The petition in *United States v. June*, No. 13-1075, presents the distinct question of whether the two-year claim-presentation deadline is subject to such tolling.

(1) Respondent Kwai Fun Wong is a Tien Tao minister, and since 1999 has been the spiritual leader – the Matriarch – of the Wu-Wei Tien Tao Association, a religious organization with members in the United States, Canada, Australia, Hong Kong, and Taiwan. She was born in Hong Kong and is a citizen of the United Kingdom.

In July 1982, Wong entered the United States with a B-2 visitor visa. Subsequently the Immigration and Naturalization Service (INS) approved an I-360 petition filed by the California Tien Tao Association, permitting Wong to remain in the United States as a religious worker/minister. She continued in the

United States without incident from 1982 until 1999, performing a wide range of religious functions for the Wu-Wei Tien Tao Association, conducting ceremonies, evangelical meetings and memorial services, and providing counseling and spiritual guidance to members of her faith.

In March 1999, the then Patriarch of the Wu-Wei Tien Tao Association, Qian Rien, died. As a minister of the Association and as Qian Rien's spiritual successor as the leader of the group, Wong was obligated to accompany Qian Rien's body back to Hong Kong and to arrange for his funeral. Eighteen days later, upon completion of her religious obligations in Hong Kong, Wong returned to the United States; she presented herself to INS and disclosed the emergency which had required her to briefly leave the country. The INS paroled her into the United States. In April 1999, Wong filed a petition for an adjustment to permanent resident status.

On June 10, 1999, INS sent Wong an "Employment Authorization" notice, advising her to come to a designated INS office in Portland, Oregon to pick up an Employment Authorization Document. This notice was a sham, a trick that violated INS policy. (ER 325). Unbeknownst to Wong, the INS a few weeks earlier had issued a warrant for Wong's arrest, having determined that her reentry into the United States was unlawful. When Wong went to the INS office, she was interrogated about her recent return

from Hong Kong, summarily arrested, and taken to the Multnomah County jail.[1]

The INS has a written policy that prohibits subjecting detainees such as Wong to strip searches. Notwithstanding that policy, the complaint alleges that INS well knew that officials at the jail were strip searching INS detainees. Wong was subjected to three strip searches in the Multnomah County jails. The strip searches included visual body cavity inspections of Wong while she was unclothed. There were men in the room during the strip searches, separated from Wong only by a fabric curtain. On June 22, 1999, INS served Wong with a removal order and shortly thereafter she flew back to Hong Kong. Wong has not been permitted to return to the United States since that time, except to be deposed in the instant litigation.

The manner in which Wong was treated caused serious harm to the Wu-Wei Tien Tao Association. Followers of the Association began to doubt Wong's spiritual leadership. The President of the Association explained that some followers

> don't recognize [Wong] saying that if [Wong] was the real Matriarch why had she been treated by the United States government

---

[1] Multnomah County is the county in which the city of Portland, Oregon is located.

> this way, the detention, the strip search, and the deportation. I know many of them don't recognize [Wong] based on this. If you're the real Matriarch [you] will have been taken care of by heaven.

(ER 331-34). One of the Association's subsidiary organizations, Chong Hua Sheng Mu Gong, refused to recognize Wong's authority and leadership as a result of the manner in which Wong had been treated by the government. (ER 332-33, 422).

(2) On May 18, 2001, Wong and the Wu-Wei Tien Tao Association filed an action in federal court against various federal officials, seeking damages based on Wong's removal and the conditions of her confinement prior to removal. App. 5a, 110a-111a, 131a. That complaint did not assert any claim under the Federal Tort Claims Act (FTCA). On the same day, Wong also presented a claim to the Immigration and Naturalization Service (INS) pursuant to the FTCA. Under the terms of the FTCA, Wong could not commence a civil action under the FTCA until six months after the presentation of that administrative claim.

On November 14, 2001, anticipating that her administrative claim would be sufficiently exhausted on November 18, 2001, Wong filed a motion seeking leave to amend her complaint to add an FTCA claim against the United States. *Id.* at 5a-6a, 111a, 112a. Wong asked that the court grant her motion "on or after November 20, 2001," at which time she would be entitled to treat the agency's failure to act as a denial.

Id. at 51a-61a, 111a. The United States opposed the motion. On December 3, 2001, the INS issued a final denial of Wong's administrative claim. Respondent then had six months (until June 3, 2002), to bring an action in federal court under the FTCA. 28 U.S.C. § 2401(b). That would doubtless have occurred as a matter of course if the court had acted promptly on Wong's already pending motion to amend her complaint.

But final action on Wong's motion did not occur for another seven months. The motion to amend was referred to a magistrate judge along with several other more complex matters. On April 5, 2002, almost five months after Wong had filed her motion to amend, the magistrate judge recommended that the motion be granted. App. 130a, 182a-185a. The government did not object to that portion of the magistrate judge's findings and recommendations, but it did object to other parts; as a consequence, the district judge was required to review the findings and recommendations. *Id.* at 114a-115a. On June 25, 2002, three weeks after the six-month deadline had passed, the district court adopted the magistrate judge's findings and recommendation. *Id.* at 128a-129a. On August 13, 2002, Wong filed her amended complaint, adding a negligence claim against the United States under the FTCA.

The United States moved for summary judgment arguing, among other things, that the district court lacked jurisdiction over the FTCA claim because it was not timely filed. The magistrate judge disagreed, and the district court adopted her findings and

recommendation. *Id.* at 106a-107a, 112a-117a. The court stressed that

> [t]he government was not faced with the presentation of stale claims and has made no showing of any prejudice whatsoever. To the contrary, the government was fully apprised of plaintiffs' claims by their administrative filing, had full notice of plaintiffs' intended FTCA claim just prior to the expiration of the six-month administrative review period, and was aware that plaintiffs were seeking to add the FTCA claim to this case *after* expiration of the six-month administrative review period.

Id. at 114a (emphasis in original). The district court reasoned that

> [a]ccepting the position of the government on this issue would effectively impose on plaintiffs a court-created Catch-22 and make a mockery of this court's prior ruling allowing the filing of the FTCA claim in this action, while doing nothing to serve the intended purpose of the statute of limitations in preventing the assertion of stale claims.... In essence, the government seeks to deny plaintiffs an opportunity to present their FTCA claims due solely to the delay inherent in the Magistrate Judge system.... The government had notice of the intended FTCA claims with the filing of the motions to amend and now simply seeks to gain an unwarranted advantage.

Id. at 115a-117a. Accordingly, the district court concluded that the six-month limitations period for filing Wong's FTCA suit should be equitably tolled for the 81 days between April 5, 2002, when the magistrate judge issued her findings and recommendations, and June 25, 2002, when the district judge adopted those findings and recommendations. *Id.* at 117a.

Several years later, while the case was still pending in the district court, the Ninth Circuit decided *Marley v. United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). *Marley* held that the six-month suit-filing limitation period is not subject to equitable tolling. Relying on *Marley*, the United States moved for reconsideration. The district court granted the motion; it held in light of *Marley* that Wong's FTCA claim was untimely and that the court therefore lacked jurisdiction over that claim.

(3) On appeal the panel invited the parties to seek hearing en banc regarding whether *Marley* had been correctly decided. A majority of the en banc court held that the six-month time bar is not jurisdictional (App. 1a-36a), and that tolling is available in appropriate cases (*id.* at 36a-43a), including in Wong's circumstances. *Id.* at 43a-48a. Chief Judge Kozinski, in a concurring opinion, concluded that the six-month limitations period is jurisdictional, but held that Wong's district court reply memorandum, filed in December 2001 after the final agency action, was sufficient to satisfy the statutory requirement. *Id.* at

48a-52a.[2] Judges Tashima and Bea filed separate dissenting opinions, in which they both joined. *Id.* at 52a-102a.

INTRODUCTION

This Court has already twice denied review of the specific question presented in this case, whether the six-month suit-filing deadline in section 2401(b) is subject to equitable tolling. *Waltz v. United States*, 132 S.Ct. 107 (2011)[3]; *Marley v. United States*, 558 U.S. 1076 (2009).[4] In both cases the United States

---

[2] App. 50a ("but the court took more than seven months to act on this routine motion – a delay Wong didn't cause and couldn't have foreseen."), 50a ("The government suggests that, instead of waiting for the district court to act on her motion, Wong should have refiled it. Yeah, right. How many litigants have the nerve to vex a federal judge with a clone motion while the original is still pending?"), 52a ("The federal judiciary caused Wong's problem, and in good conscience we should use such powers as we have to make it up to her.").

[3] Brief for Respondents in Opposition, No. 10-1436, i, available at 2011 WL 3010264:

> Under the Federal Tort Claims Act, "[a] tort against the United States shall be forever barred" unless a suit "is begun within six months after the date of mailing ... of notice of final denial of the claim" by the relevant agency. 28 U.S.C. 2401(b). The question presented is whether the six-month deadline prescribed by Section 2401(b) for filing a complaint in district court is subject to equitable tolling.

[4] Petition for a Writ of Certiorari, No. 09-270, i, available at 2009 WL 2864363:

(Continued on following page)

successfully argued that certiorari should not be granted. In *Waltz* the government explained that "[t]his Court recently denied certiorari in an essentially identical case.... *Marley v. United States*, cert. denied, 130 S.Ct. 796 (2009). Further review is similarly unwarranted here." Brief for the Respondents in Opposition, *Waltz v. United States*, No. 10-1436, 3. Further review is also unwarranted in the instant essentially identical case.

In *Marley* and *Waltz* the private petitioners argued that the decision in *Marley*, which had held that the six-month suit-filing deadline is not subject to equitable tolling, conflicted with decisions in several other circuits which held that equitable tolling is available with regard to the two-year claim-presentment deadline in section 2401(b). In opposing review in *Marley* and *Waltz*, the United States insisted that the availability of tolling of the six-month

---

28 U.S.C. § 2401(b) establishes a six-month statute of limitations for damage actions brought against the United States under the Federal Tort Claims Act. Is the statute of limitations:

(1) jurisdictional, and therefore a bar to the application of equitable limitations, as the Ninth Circuit has held;

(2) not jurisdictional, and therefore not a bar to the application of equitable limitations, as the First, Third, Fifth, and Sixth Circuits have held; or

(3) jurisdictional, but also not a bar to the application of equitable limitations, as the Eighth Circuit has held?

suit-filing deadline presents issues distinct from those raised by tolling the two-year claim-presentment deadline. For that reason, the government insisted, decisions permitting tolling of the two-year limitation period did not conflict with the Ninth Circuit decisions in *Marley* and *Waltz*, which had barred tolling of the six-month period.[5] The instant case, like *Marley* and *Waltz*, concerns only the six-month limitations period; the Ninth Circuit en banc decision in the instant case overturned that circuit's previous decision in *Marley*. Yet the government's petition in this case, like the petitions it successfully opposed in *Marley* and *Waltz*, now relies largely on decisions regarding the two-year limitations period, citing many of the same cases which it emphatically distinguished in the briefs in opposition which the United States filed in 2009 and 2011.

In *Marley* and *Waltz* the United States also argued that, even if the availability of tolling of the six-month period were indistinguishable from the availability of tolling of the two-year period, review by this Court would be premature.[6] At that point in time, the Ninth Circuit had rejected tolling of the six-month

---

[5] Brief of the United States in Opposition, *Marley v. United States*, 8-10, available at 2009 WL 3614462; Brief for the Respondents in Opposition, *Waltz v. United States*, 3-4, 7-9, available at 2011 WL 3010264.

[6] Brief of the United States in Opposition, *Marley v. United States*, 10; Brief for the Respondents in Opposition, *Waltz v. United States*, 10.

period, while numerous other circuits had permitted tolling of the two-year period. The government argued that the disagreement might in time disappear; it suggested that the circuits permitting tolling of the two-year period might well reconsider that holding in light of *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). The conflict that existed between these two lines of cases has indeed disappeared, but not for the reason anticipated by the government. The circuits that in 2009 and 2011 permitted tolling of the two-year limitations period continue to do so; none of those circuits have abandoned that rule in the wake of *John R. Sand & Gravel*. But the Ninth Circuit in the instant case overturned *Marley*, and now permits tolling of the six-month limitations period, thus eliminating the difference in approach that existed at the time of the petitions in *Marley* and *Waltz*.

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE AVAILABILITY OF EQUITABLE TOLLING OF THE SIX-MONTH SUIT-FILING LIMITATIONS PERIOD

The United States does not contend that there is any circuit conflict in decisions applying the six-month suit-filing deadline itself. The government refers to only a single 20-year old decision outside the Ninth Circuit which presented considered this specific issue. *Benge v. United States*, 17 F.3d 1286, 1288 (10th Cir. 1994). Petitioner describes the Tenth Circuit decision in *Benge* as "assuming arguendo that court[s] may equitably toll [the] six-month deadline."

Pet. 24.[7] The government does not suggest that the Tenth Circuit decision in *Benge* provides a basis for granting review in the instant case, which held that the six-month deadline is subject to such tolling.

The petition (like the unsuccessful petitions in *Marley* and *Waltz*) rests instead on decisions in other circuits regarding the distinct two-year claim-presentment deadline. But in *Marley* and *Waltz* the government insisted that the availability of tolling of the six-month period was so distinct from the availability of tolling of the two-year period that the Ninth Circuit decision rejecting the former was not inconsistent with decisions in several other circuits permitting the latter. In its brief in opposition in *Marley,* the United States asserted that "the decision of the [Ninth Circuit] court of appeals ... does not conflict with any decision ... of any other court of appeals." Brief of the United States in Opposition, *Marley v. United States*, 5.

> Petitioner asserts ... that this Court's review is warranted to resolve a conflict in authority on the question presented. But none of the cases petitioner cites involves the six-month limitations period here at issue ... ; all of the

---

[7] The government's description of *Benge* as only "assuming arguendo" that tolling was permissible seems unduly grudging. The Tenth Circuit held that "[it] is settled law that in a narrow range of situations a federal statute of limitations may be equitably tolled. *See Irwin v. Veterans Admin.,* 498 U.S. 89, 94-96 ... (1990)...." 17 F.3d at 1288.

> petitioner's cases instead involve the FTCA's two-year time limit for presenting a claim to the appropriate federal agency in the first instance.... Although the FTCA's six-month limitations period and the two-year limitations period are contained in the same section of 28 U.S.C. 2401, they are not identical. The two-year period is applicable to administrative claims, and is principally designed to provide the relevant agency an opportunity to consider and settle the claim before the claimant seeks judicial review. The FTCA imposes no time limits on an agency's disposition of an administrative claim.... In contrast, the six-month period is a strict limitation on the filing of a claim in federal court. It is designed, among other things, to serve a systematic interest in judicial efficiency.... The decision below, in short, creates no circuit conflict that warrants this Court's intervention.

Id. at 8-10. The government advanced the identical analysis in *Waltz*. Brief for the Respondents in Opposition, *Waltz v. United States*, 4, 7-9. Only six months ago, the United States asserted in a brief in *June v. United States*, 2013 WL 6773664 (9th Cir. Dec. 24, 2013), that the availability of tolling of the two-year period presents a legal question that is distinct from the availability of tolling of the six-month period.[8]

---

[8] Supplemental Brief for Appellee, *June v. United States*, No. 11-17776 (9th Cir.), 5-6 ("*Wong* ... addressed the Federal Tort

(Continued on following page)

Even if the decision below regarding tolling of the six-month period is compared to decisions regarding tolling of the two-year period, there still is no reason for this Court to grant review. The government effectively acknowledges that at least seven circuits hold that the two-year limitation period is subject to equitable tolling. Pet. 23.[9] That is the rule in the First, Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits. *Id.* The United States does not contend that the established law in any of the remaining circuits bars equitable tolling of the two-year or six-month periods. The dissenting opinions in the court below did not claim that there were decisions in any other circuit holding that either of the section 2401(b) time limitations is not subject to tolling. App. 84a

---

Claims Act's six-month deadline for filing suit once the government has issued an administrative decision.... *Wong* did not address the two-year deadline for initiating a tort against the United States. The two-year time bar was passed against a different background and serves different functions than the six-month provision. *Wong* did not address the historical, contextual, and structural features that are unique to the two-year time bar."), 7-8 ("nothing in *Wong* is 'clearly irreconcilable' with this court's prior holdings that the two-year time bar is jurisdictional. *Wong* concerned a different time limit passed against a different background that serves a different function.... [T]he history and context of [the two-year time bar] [i]s distinct from the six-month filing deadline...."). That brief was filed in November, 2013.

[9] "Three courts of appeals ... now hold that FTCA time limits are nonjurisdictional and are subject to equitable tolling.... Four other courts of appeals now hold or (perhaps) suggest that the FTCA time limits are jurisdictional, but are nevertheless subject to equitable tolling...."

n.21 (Bea, J., dissenting) (arguing that the "out of circuit authority ... for the proposition that § 2401(b) is subject to tolling ... [is] not persuasive"). The First Circuit has correctly observed that "[t]he other circuits generally explicitly agree or simply take it as given that equitable tolling defenses are applicable in the context of the FTCA." *Rakes v. United States*, 442 F.3d 7, 25 (1st Cir. 2006); see *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006) ("[w]e ... align ourselves with several other circuits in holding that considerations of equitable tolling" may be considered by court). This is not, as the petition suggests, "an area ... mired in uncertainty" (Pet. 10), but an area of settled law.

The government suggests that there is "widespread conflict" (Pet. 22) because the courts of appeals that permit equitable tolling have articulated different rationales for arriving at that conclusion. The Third, Seventh and Ninth Circuits "hold that FTCA time limits are nonjurisdictional and are subject to equitable tolling." Pet. 23. On the other hand, according to the government, the First, Fourth, Eighth and Tenth Circuits apply equitable tolling even though they "hold or (perhaps) suggest that the FTCA time limits are jurisdictional." *Id.* But where the courts of appeals agree on the controlling legal standard, it is of no importance whether – as is often the case – those courts have employed different legal reasoning to arrive at the same conclusion. Where, as here, a particular issue is settled law in the lower courts, this Court does not grant review merely to decide which circuit court articulated the most cogent

justification for that consensus interpretation of the law.

Petitioner objects that if the First, Fourth, Eighth or Tenth Circuit held that the FTCA time limits are jurisdictional, but nonetheless permit tolling, that would be "inconsistent with this Court's decisions concerning the nature of a jurisdictional limitation." Pet. 23. (Of course, the government also objects that the decisions holding that the time limitations are not jurisdictional are also wrongly decided.) The United States may intend to suggest that a circuit that has held that the time limitations are jurisdictional and yet also subject to tolling would now reconsider that decision in light of *John R. Sand & Gravel.*[10] But even if such a circuit were in the future to conclude that under *John R. Sand & Gravel* a limitations period could not be both jurisdictional and subject to tolling, there is no way of knowing whether that court would resolve that inconsistency by abandoning its holding that the limitations are jurisdictional (thus preserving the consensus on

---

[10] At one time it was the position of the United States that the limitations periods in section 2401(b), although jurisdictional in nature, were nonetheless subject to equitable tolling. Brief for Defendant Appellee, *Marley v. United States*, No. 06-36006 (9th Cir.), 54 ("The United States submits that the Court should find that the FTCA's statute of limitations is jurisdictional but subject to equitable tolling in appropriate cases.... [T]he Eighth Circuit has recently found that the FTCA's statute of limitations is jurisdictional but that the rule of equitable tolling applies is one of the 'terms' of the government's consent to be sued. *T.L. v. United States*...."), available at 2007 WL 1308517.

tolling) or by repudiating its rule that tolling is available (thus creating a circuit conflict).[11] This Court grants review only to resolve existing circuit conflicts, not to address issues which might conceivably be the subject of such a conflict at some point in the future. In *Marley* and *Waltz* the government argued that it would be "premature" to grant review of any then-existing circuit conflict because it was possible that the circuits which permitted tolling might reconsider that holding in light of *John R. Sand & Gravel* and thus *eliminate* the then-existing circuit conflict. It would be even more premature to grant review in the absence of any current conflict because of the possibility that circuits which today permit tolling will reconsider that holding and *create* a conflict at some point in the future.

---

[11] The First Circuit recently indicated that if this Court's decisions mean that a jurisdictional limitations period cannot be tolled, it would abandon its prior holding that the two-year limitations period is jurisdictional, and retain tolling.

> The Supreme Court's most recent guidance on what is "jurisdictional" suggests that we may have erred in presuming that subject matter jurisdiction hinged on compliance with the FTCA's deadlines for presenting claims.... If we did so err, however, it does not follow that we also erred in presuming that equitable tolling can stay the running of the FTCA's deadlines. To the contrary, classifying the deadlines as non-jurisdictional enhances the case for finding equitable tolling to be available.

Sanchez v. United States, 740 F.3d 47, 54 (1st Cir. 2014).

Petitioner notes that "[t]hree circuits have expressly declared the question open and declined to decide it." Pet. 24. "The state of the law is thus unsettled...." *Id.* But most legal issues have not been definitively addressed by all twelve geographical circuits, and there are countless issues which one or more courts of appeals have "declared open and declined to decide." The fact that a given question is still percolating in the lower courts is often a reason to deny review even when a circuit conflict has arisen; assuredly that same circumstance cannot provide a basis for review when no such circuit conflict yet exists.

With regard to decisions in the Fifth and Sixth Circuits, the petition comments that "[t]wo other circuits have conflicting case law that is difficult to reconcile." Pet. 24; see *id.* at 10-11 ("an area that has been mired in uncertainty"), 22 ("the current state of the law can best be described as widespread ... confusion"). But the existence of disagreements *within* a circuit is not a ground for review by this Court. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States,* 353 U.S. 901, 902 (1957). In the Sixth Circuit, the controlling precedent remains the decision in *Glarner v. U.S. Dep't of Veterans Admin.,* 30 F.3d 687 (6th Cir. 1994). Relying on this Court's opinion in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *Glarner* rejected as "incorrect" the government's contention that the two-year limitation period "is a

jurisdictional statute of limitations that cannot be equitably tolled." 30 F.3d at 701.[12] Although some unreported Sixth Circuit decisions since *Glarner* have assumed that the two-year limitation is jurisdictional, those unreported decisions have no precedential value; district courts in the Sixth Circuit continue to recognize *Glarner* as binding authority.[13] In *Bazzo v. United States*, 494 Fed.Appx. 545 (6th Cir. 2012), on which the petition relies, the Sixth Circuit expressly declined to act on the government's request [14] that it

---

[12] Prior to *Irwin* the Sixth Circuit had rejected equitable tolling of the two-year limitation period on the ground that the courts "are not free to enlarge the consent to be sued...." *Rogers v. United States*, 675 F.2d 123, 124 (6th Cir. 1982). This Court's subsequent decision in *Irwin* expressly rejected that argument, holding that the effect of equitable tolling was too minor to be characterized as an enlargement of the scope of consent. 498 U.S. at 457.

[13] *Sykes v. United States*, 2011 WL 3739017 at *8 (S.D.Ohio July 22, 2011) ("In light of the precedent of *John R. Sand*, the United States ... asserts that the 'precedential value of the *Glarner* case is suspect and no longer good law.' ... The Sixth Circuit has not reexamined its holding in *Glarner* in light of the Supreme Court's decision in *John R. Sand*. Therefore, the *Glarner* decision remains the controlling authority in this Circuit which is binding on this Court.") (footnote omitted); *Bazzo v. United States*, 2011 WL 2601009 at *2 (E.D.Mich. June 30, 2011) ("the FTCA limitations period is susceptible to equitable tolling.... Absent a clear statement of law irreconcilably contrary to existing precedent, this Court is bound by *Glarner*"), *aff'd*, 494 Fed.Appx. 545 (6th Cir. 2012).

[14] See Brief for the United States, *Jackson v. United States*, No. 13-1243 (6th Cir.), 23 ("*Glarner* ... may no longer be good law on this point and should be re-examined in light of ... *John R. Sand & Gravel*...."), available at 2013 WL 3366400.

"reconsider *Glarner* in light of ... *John R. Sand & Gravel.*" 494 Fed.Appx. at 546.

The United States also argues that review should be granted because "[t]he current state of the law is ... in a state of flux. The uncertainty has persisted for some time." Pet. 24-25. "For decades after the FTCA's enactment, the courts of appeals uniformly characterized the time bars in Section 2401(b) as jurisdictional and attached jurisdictional consequences to untimely filings. See note 5, *supra*." Pet. 22. "[R]ecently ... some courts of appeals have reconsidered ... that settled circuit precedent in light of intervening decisions of this court." *Id.* The cases cited in note 5 of the petition all predate this Court's 1990 decision in *Irwin*. The "recent[ ]" appellate decisions interpreting section 2401(b) to permit tolling include the 1994 decisions in *Glarner* and *Bechem*.

To the extent that the approach taken by the lower courts has evolved over the last quarter century, that development was a proper response to the decisions of this Court. Prior to *Irwin*, this Court had "decide[d] each case [about tolling] on an ad hoc basis." 498 U.S. at 95. *Irwin* disavowed that earlier approach because it had "the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* The holding in *Irwin* – "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," 498 U.S. at 95-96 – was an avowed departure from the Court's past practice.

See 498 U.S. at 98 (White, J., dissenting) ("the Court's holding [is] inconsistent with our traditional approach"). This Court's recent decisions in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006), and its progeny, disapproving the previous casual characterization of limitations periods and other rules as "jurisdictional," were even more emphatically intended to alter past practice. *Gonzalez v. Thaler*, 132 S.Ct. 641, 648-49 (2012); *Henderson v. Shinseki*, 131 S.Ct. 1197, 1202-03 (2011); *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-62 (2010).

The government circumspectly does not assert that prior to *Irwin* it was settled law in the circuit courts that because the section 2401(b) limitations periods were jurisdictional, equitable tolling was not available. Although most of the pre-*Irwin* cases cited in note 5 of the petition characterized one or the other of the section 2401(b) limitations periods as jurisdictional, none of them held that denial of tolling was a "jurisdictional consequence."[15] The United States asks

---

[15] In most of the cases cited in note 5 of the petition, although the court characterized one of the section 2401(b) limitations requirements as "jurisdictional," there was no request for equitable tolling; generally the only "jurisdictional" consequence, if any, was that a case was dismissed for lack of jurisdiction rather than for failure to state a claim on which relief could be granted. *In re "Agent Orange" Product Liability Litigation v. Dow Chemical Co.*, 818 F.3d 210, 214 (2d Cir. 1987) (claim of one plaintiff dismissed because she had never filed an administrative claim at all); *Allgeier v. United States*, 909 F.2d 869, 871 (6th Cir. 1990) (amendment to complaint filed after

(Continued on following page)

limitations period did not relate back under Rule 15 because it was not received by the United States Attorney during time period required by Rule); *Charlton v. United States,* 743 F.2d 557, 558-59 (7th Cir. 1984) (compliance with regulation requiring claimant to provide information to agency is not jurisdictional); *Schmidt v. United States,* 901 F.2d 680, 683 (8th Cir. 1990) (burden of proof is on plaintiff to establish when letter mailed by agency); *Adkins v. United States,* 896 F.2d 1324, 1326 (11th Cir. 1990) (claim presentment requirement not met because claim did not state a sum certain); *Sexton v. United States,* 832 F.3d 629, 633 and n.4 (D.C.Cir. 1987) (applying discovery rule in *United States v. Kubrick,* 444 U.S. 111 (1979)).

Two of the cited decisions bar equitable tolling, but do not characterize either limitation period as jurisdictional. *Peterson v. United States,* 694 F.2d 943, 945 (3d Cir. 1982) (extension of limitations period for equitable reasons not permitted because there must be "strict observance of the limitations period"); *Anderberg v. United States,* 718 F.2d 976, 977 (10th Cir. 1983) (extension of limitations period for equitable reasons not permitted because conditions of government consent to suit must be "strictly observed").

Gonzalez-Bernal v. United States, 907 F.2d 246, 248, 250 (1st Cir. 1990), held that the six-month limitation period is jurisdictional, but permitted tolling of that period based on government misconduct. *Gould v. U.S. Dep't of Health & Human Services,* 905 F.2d 738, 741-42 (4th Cir. 1990), held that the two-year limitation requirement is jurisdictional, but still subject to the discovery rule in *Kubrick* and subject to tolling in the case of certain government misconduct.

Simon v. United States, 244 F.2d 703, 705 (5th Cir. 1957), characterized the two-year limitations period as jurisdictional, but held that tolling was not permissible regardless of whether a deadline was jurisdictional or merely a statute of limitations. *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968), held that the two-year limitation period is jurisdictional and that the deadline is not tolled during the minority of a claimant, but did not assert that the unavailability of tolling was due to the jurisdictional nature of the deadline.

the Court to grant review "to restore the mandatory and jurisdictional force of the FTCA's time bars" (Pet. 22); but there never was any pre-*Irwin* consensus that the jurisdictional nature of the section 2401(b) limitations periods barred equitable tolling.

What has indeed fluctuated over recent years is the position of the United States regarding whether equitable tolling is available regarding the six-month or two-year limitations periods in section 2401(b). In *Perez v. United States,* 167 F.3d 913 (5th Cir. 1999), and *Kokotis v. United States Postal Service,* 223 F.3d 275 (4th Cir. 2000), the government agreed that equitable tolling does apply to FTCA claims. Brief of Appellee, *Kokotis v. United States Postal Service,* 21 ("The doctrine of equitable tolling of statutes of limitations is applicable to suits against the United States. *Irwin v. Department of Veterans Affairs....*"); Brief of Appellee, *Perez v. United States*, 10-11 ("The Supreme Court confirmed the applicability of equitable tolling against the United States in *Irwin....*"). In briefs filed in *Santos v. United States,* 559 F.3d 189 (3d Cir. 2009), and in *T.L. v. United States,* 443 F.3d 956 (8th Cir. 2006), the government acknowledged that prior decisions in the Third and Eighth Circuits, respectively, had permitted tolling of the FTCA two-year limitations period, and did not indicate any disagreement with that rule.[16] In a 2007 brief the

---

[16] Brief for Defendant-Appellee United States of America, *Santos v. United States,* 19 ("[t]his Court has indicated that the doctrine of equitable tolling applies to FTCA suits under certain

(Continued on following page)

government took the position that although the time limitations in section 2401(b) are jurisdictional, tolling is nonetheless permitted.[17] In its brief in *Arteaga v. United States*, 711 F.3d 828 (7th Cir. 2013), the government stated only that it was "not clear that equitable tolling applies at all in FTCA cases."[18] On the other hand, in briefs filed in 2010-13, the Department of Justice has argued that those limitations are jurisdictional and, for that reason, do not permit equitable tolling.[19] The petition argues that *Perez*, *Kokotis*, *Santos*, *T.L.*, and *Arteaga* were all wrongly decided, and urges this Court to grant review to correct those errors; but the government to a significant degree invited the very circuit court decisions to which it now objects.

---

circumstances") (citing *Hughes v. United States*, 263 F.3d 272, 278 (3d Cir. 2001) and *Hedges v. United States*, 404 U.S. 744, 748-49 (3d Cir. 2005)); Brief of Appellee, *T.L. v. United States*, 13 ("[t]he Government does not dispute that the Eighth Circuit has 'appl[ied] the doctrine of equitable tolling to FTCA claims against the government.' *Motley v. United States*, [295 F.3d 820,] 824 [(8th Cir. 2002)]"), available at 2005 WL 5628152.

[17] See *supra*, n.10.

[18] Brief of the United States, *Arteaga v. United States*, 14, available at 2012 WL 6800266; see *id.* at 16 (noting that in applying the controlling legal principles, federal courts have not always dismissed cases in which the plaintiffs did not present their claims within the two-year period).

[19] *E.g.*, Brief for Appellee United States, *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 646 F.3d 185 (5th Cir. 2011), 36-38, available at 2010 WL 4619550; Brief for the United States, *Bazzo v. United States*, 494 Fed.Appx. 545 (6th Cir. 2012), at 11-24, available at 2011 WL 6146274.

The United States is entitled to change its position and to argue in the lower courts, as it has most recently, that current settled law permitting equitable tolling should be reconsidered in light of this Court's decision in *John R. Sand & Gravel*. But review by this Court would not be warranted until and unless the government is able create a circuit conflict by persuading one or more circuits to clearly hold that equitable tolling of the six-month or two-year limitations period is impermissible.

II. THE QUESTION PRESENTED IS NOT OF SUFFICIENT PRACTICAL IMPORTANCE TO WARRANT REVIEW BY THIS COURT

Disputes about tolling of the six-month limitations period in section 2401(b) are extremely uncommon. Even if a circuit split existed about that question, it would not be of sufficient importance to warrant review by this Court.

The six-month period provided for filing suit under the FTCA is of substantial length, and the period is commenced by written notification from the government. As the petition correctly observes, "[w]ith such a readily ascertainable triggering event, there should be few if any occasions for equitable tolling even if it were permitted." Pet. 21. The petition, however, asserts: "But that does not mean that plaintiffs would not routinely assert tolling to excuse a late filing. As the voluminous case law reveals (see Pt. B, *infra*), they will. Under the regime adopted by the

Ninth Circuit, numerous federal agencies would be forced 'to respond to, and [sometimes] litigate, large numbers of late claims, accompanied by requests for "equitable tolling" which, upon close inspection, ... turn out to lack sufficient equitable justification.' *Brockcamp*, 519 U.S. at 352." Pet. 21-22; see *id.* at 22 ("The issue has recurred with remarkable frequency.").

But the "voluminous case law" in Part B of the petition does not support this assertion. Pet. 22-25. Although that portion of the petition refers to seventeen FTCA cases, only two of those decisions actually involved the six-month limitations period: the instant case, and the 20-year old Tenth Circuit decision in *Benge*.[20] All the other decisions concerned disputes about equitable tolling of the two-year claim-presentation deadline. Cases in which plaintiffs seek tolling of the six-month limitations period are infrequent, and arise only out of uncommon, highly idiosyncratic circumstances. In the instant case, for example, a routine motion to amend a complaint was not resolved in the district court for an unusually lengthy seven months, and that seven-month period happened to coincide with and encompass the entire six-month suit-filing period. In *Benge* the original complaint had been dismissed for lack of service, and the six-month limitations period (unless tolled) would

---

[20] See Pet. 23 n.8 ("some of the courts of appeals' decisions involve the two-year deadline in 28 U.S.C. 2401(b) for presentation of a claim to the appropriate agency").

have run while that complaint was pending, precluding the plaintiff from initiating a second action. It is unlikely that the procedural situation in either the instant case or in *Benge* will arise again – assuredly not "routinely" – in future FTCA cases. The particular limitations problem in *Benge* was solved by the 1993 amendment to Rule 4 of the Federal Rules of Civil Procedure. See 1993 Advisory Committee Note, subdivision m.

Petitioner objects that merely having to litigate tolling disputes imposes a substantial burden on the government. The paucity of tolling disputes regarding the six-month limitations period largely undercuts that contention. Moreover, even in the absence of tolling, the United States often would still have to litigate other possible grounds for relief. For example, in the instant case Chief Judge Kozinski would have held that the reply memorandum filed by Wong in December 2001 satisfied the requirements of section 2401(b). App. 48a-52a. The majority agreed that it might be possible to rule for Wong on that basis, but preferred to solve the problem through equitable tolling. *Id.* at 43a-44a ("[w]e assume, without deciding, that Wong's FTCA claim was filed in the district court too late.... [T]here may be a defensible road through this thicket...."), 45a ("there is little difference in the underlying justification between applying traditional equitable tolling principles and devising a novel equitable solution to the filing date problem in this case."). Whatever litigation burden these uncommon disputes impose on the government and the

courts would not be significantly alleviated, if at all, by requiring the plaintiffs to search for and litigate an alternative solution in the Federal Rules of Civil Procedure or elsewhere in the law.

Although disputes about equitable tolling of the two-year limitation period are somewhat more common, here too a rejection of equitable tolling would not necessarily simplify litigation. Under *United States v. Kubrick*, 444 U.S. 111 (1979), FTCA claims are subject to a discovery rule; a claim does not "accrue[]" within the meaning of section 2401(b) so long as a plaintiff neither knows nor has reason to know of his injury or of the cause of that injury. If this Court were to hold that plaintiffs may invoke only that discovery rule, but not equitable tolling, parties and courts would be forced to grapple with the often elusive distinction between these two closely related doctrines; future litigation would also have to address whether equitable estoppel or fraudulent concealment can be invoked in an FTCA case. *Klehr v. A.O. Smith Corp.*, 521 U.S. 170, 192 (1997), recognized that the distinctions among a discovery rule, equitable tolling and equitable estoppel "may be subtle and difficult." See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-52 (7th Cir. 1991) (discussing differences among discovery rule, equitable tolling, equitable estoppel, and fraudulent concealment).

III. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THE SIX-MONTH SUIT-FILING DEADLINE IS SUBJECT TO EQUITABLE TOLLING

Most of the petition in this case is devoted, not to a contention that the question presented is the subject of a circuit conflict, but instead to an argument that the Ninth Circuit's "decision is wrong." Pet. 10. The petition spends thirteen pages on criticism of the Ninth Circuit's analysis of the text, structure, purpose and legislative history of the six-month limitations period, and less than three pages to the government's assertion that there is confusion and "conflict" – but not a circuit conflict – among the lower courts. The court of appeals' analysis (like that of the dissenting opinions) is well-reasoned and exhaustive. The government does not suggest that the conclusion of the en banc majority is so palpably and unusually misguided as to justify exercise of this Court's supervisory authority.

The government insists that "review of the decision of the divided en banc Ninth Circuit is warranted to restore the mandatory and jurisdictional force of the FTCA's time bars." Pet. 22. But that argument is only a particularly emphatic way of reiterating the government's contention that the court of appeals made a mistake in its interpretation of the statute. Whether the FTCA time bars have "jurisdictional force" is the very question in this case; the Court could not conclude that review was "warranted to restore the ... jurisdictional force of the

FTCA's time bars" without first deciding the merits of this case. Only after determining that the Ninth Circuit had erred could this Court assess whether "restor[ing] th[at] jurisdictional force" is of such importance as to warrant exercise of this Court's discretionary jurisdiction.

The merits arguments set out in the petition generally revisit the same issues of statutory construction already carefully considered by the majority (and dissents) below. A few issues raised in the petition warrant further comment.

The petition sets out two distinct merits arguments, that the six-month suit-filing deadline is jurisdictional (Pet. 11-18) and that this deadline, even if non-jurisdictional, still does not permit equitable tolling. Pet. 18-22. The government did not raise the second argument in the Ninth Circuit; its briefs in that court were limited to an assertion that the six-month limitation period is jurisdictional. The court of appeals nonetheless decided that second issue. App. 36a-43a. But a number of the specific arguments regarding that issue now advanced by the United States in this Court, such as its discussion of the early drafts of the FTCA and of the use of private bills under the Tucker Act (Pet. 19-20), were not raised by the government in the court below and thus were never considered by the court of appeals.

The government argues, as it did below, that the jurisdictional nature of the six-month limitations

period is demonstrated by the use of the phrase "forever barred" in section 2401(b).[21] This Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), expressly refused to attach jurisdictional significance to this type of language.

> In [the provision of Title VII authorizing a civil action by federal employees] Congress said that "[w]ithin thirty days ... an employee ... may file a civil action...." In [the Tucker Act] Congress provided that "[E]very claim ... shall be barred unless the petition ... is filed ... within six years...." An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different

---

[21] Pet. 13 ("The text Congress chose for the FTCA's suit-filing bar is the same that it had long used to set deadlines for damages actions against the United States under the Tucker Act. See ... 12 Stat. 767 ... ('every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court ... within six years after the claim first accrues') ... And it is the same operative text this Court has repeatedly construed in Tucker Act suits against the United States as jurisdictional and not subject to equitable exceptions."), 17 ("Section 2401(b) contains emphatic language ('shall be forever barred') that was patterned after the jurisdictional limitation on Tucker Act suits...."), 19 ("Congress used particularly 'emphatic' language. [*United States v.*] *Brockamp*, 519 U.S. [347,] 350 [(1997)]; see 28 U.S.C. 2401(b) ('[A] tort claim against the United States ... shall be 'forever barred.')" (emphasis in petition).

> congressional intent with respect to the availability of equitable tolling.

498 U.S. at 95. In *Irwin* the United States correctly argued that the presence or absence of the phrase "shall be barred" was of no relevance in determining whether equitable tolling would be permitted:

> QUESTION: Well, in cases like Soriano ... you can point to the fact that the statute said something like suit shall be barred if not brought within so many days. There was something more than the mere time limit set for it here.
>
> MR. ROBERTS: Your honor, that distinction is there, but I don't think it's a distinction that makes a difference. I think that type of language has more to do with legal rhetoric at the time the statute was passed.

(1990 WL 601331 at *30-*31).[22] The decision of the Ninth Circuit in the instant case regarding this type of statutory language is consistent with the position of the government in *Irwin*.

IV. THIS CASE SHOULD NOT BE CONSOLIDATED WITH *UNITED STATES V. JUNE*

Petitioner suggests that if certiorari is granted both in this case and in *United States v. June*, No.

---

[22] The Court's question is referring to *Soriano v. United States*, 352 U.S. 270 (1957).

13-1075, the two cases should be consolidated for briefing and argument. Pet. 11 n.2.

The government's suggestion is in some tension with its position in *Marley* and *Waltz*, where it contended that the issue of whether the six-month suit-filing limitations period is subject to equitable tolling is quite distinct from the issue of whether such tolling is available with regard to the two-year claim-presentation limitations period. See *supra,* pp. 12-13.

More importantly, consolidation would pose an insolvable problem for arguing counsel. In *Marley* and *Waltz* the government suggested that, even if tolling is barred for the six-month limitation period, it still might be permissible for the two-year limitation period.[23] Counsel for respondent in *June* may wish to advance just such an argument. On the other hand, in its Ninth Circuit brief in *June*, the government took the opposite position, suggesting that tolling

---

[23] Brief of the United States in Opposition, *Marley v. United States*, 9-10 ("In the government's view, both the two-year and the six-month limitations provisions ... are properly considered jurisdictional in nature, and thus are not subject to equitable tolling. But even assuming the FTCA's two-year administrative filing deadline were subject to equitable tolling in appropriate circumstances, it would not follow that its six-month statutory time period for filing complaints in court would also be subject to equitable tolling. The latter limitations period is short, to ensure particular expedition, and it is triggered by a specific notice denying the administrative claim, which sets a readily identifiable date for the filing of a suit."). The same argument is contained in the Brief for the Respondents in Opposition, *Waltz v. United States*, 10.

should be precluded for the two-year limitations period, even though (under the Ninth Circuit decision in *Wong*) it was permitted for the six-month limitations period.[24] Counsel for respondent in *Wong* may wish to advance that contention. If, however, a single attorney were required at oral argument to represent both Ms. June and Ms. Wong, that attorney could not advance both – or either – of these inconsistent positions.

---

[24] Supplemental Brief for Appellee, *June v. United States*, No. 11-17776 (9th Cir.), 11-14 ("Congress' decision to [illegible] two-year time bar to a requirement of presenting an administrative claim underscores in a number of ways that the two-year time bar is jurisdictional. First, the requirement of presenting an administrative claim is incontrovertibly jurisdictional.... The requirement to file a claim within two years is part and parcel of the jurisdictional requirement to file the administrative claim.... In 1988, Congress added a further provision, 28 U.S.C. § 2679(d)(5), ... that ... again directly tied the jurisdictional requirement of filing an administrative claim to the two-year time period for doing so."), 13 ("The 'interest in assuring that agency officials have a full opportunity to investigate and consult internally with regard to claims for compensation,' *Wong* [App. 35a], would be greatly undermined if someone could file an administrative claim years after an event occurred when it was no longer possible 'to investigate and consult internally' with employees who had since left."), 16 ("[A]ny presumption in favor of equitable tolling ... 'generally involve[s] time limits for filing suit in federal court,' [*Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, 827 (2013)] and the Supreme Court has noted that the presumption has never applied to certain deadlines for filings before agencies.... The two-year time bar, unlike the six-month limitations period, is a deadline for filing administrative monetary claims with government agencies.").

CONCLUSION

The petition for a writ of certiorari should be denied. In any event, the Court should not consolidate this matter with *United States v. June*.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

TOM STEENSON
P.O. Box 820207
Portland, OR 97282
(971) 645-6625

BETH CREIGHTON
CREIGHTON & ROSE, P.C.
815 S.W. Second
Suite 500
Portland, OR 97204
(503) 221-1791

Counsel for Respondent

**Counsel of Record*

REPLY BRIEF

Nos. 13-1074 and 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Abdelmoneim v. *Department of the Army*, No. 12-cv-5268, 2014 WL 1277905 (E.D.N.Y. Mar. 27, 2014) 7

Adderson v. *United States*, No. 12-cv-395, 2013 WL 3717731 (N.D. Fla. July 16, 2013) 7

"Agent Orange" Prod. Liab. Litig., In re, 818 F.2d 210 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) 5

Alexander v. *United States*, No. 14-cv-0137, 2014 WL 1871859 (S.D. Cal. May 5, 2014) 7

Alvarez-Machain v. *United States*, 107 F.3d 696 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997) 6

Benge v. *United States*, 17 F.3d 1286 (10th Cir. 1994) 7

Burns v. *United States*, 764 F.2d 722 (9th Cir. 1985) 5

Carter v. *McHugh*, 869 F. Supp. 2d 784 (W.D. Tex. 2012) 3

Charlton v. *United States*, 743 F.2d 557 (7th Cir. 1984) 5

de Casenave v. *United States*, 991 F.2d 11 (1st Cir. 1993) 8

FEMA Trailer Formaldehyde Prods. Liab. Litig., In re, 646 F.3d 185 (5th Cir. 2011) 3

Gallardo v. *United States*, No. 12-55255, 2014 WL 1424469 (9th Cir. Apr. 15, 2014) 6, 8

Glarner v. *United States*, 30 F.3d 697 (6th Cir. 1994) 3

Goldblatt v. *National Credit Union Admin.*, 502 Fed. Appx. 53 (2d Cir. 2012) 8

Gonzalez-Bernal v. *United States*, 907 F.2d 246 (1st Cir. 1990) 5

Cases—Continued: Page

Gould v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) 5
Hall v. *United States*, No. 12-1387, 2013 WL 4047578 (D. Kan. Aug. 9, 2013) 7
Hart v. *United States*, 817 F.2d 78 (9th Cir. 1987) 5
Hill v. *United States*, No. 13-cv-307, 2014 WL 675498 (S.D. Ill. Feb. 21, 2014) 7
Hill v. *United States*, 296 Fed. Appx. 921 (11th Cir. 2008), cert. denied, 558 U.S. 874 (2009) 8
Houston v. *USPS*, 823 F.2d 896 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988) 5
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 4
Jackson v. *United States*, No. 13-1243, 2014 WL 1876240 (6th Cir. May 12, 2014) 4, 8
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 2
Kendall v. *United States*, 107 U.S. 123 (1883) 9
Mann v. *United States*, 399 F.2d 672 (9th Cir. 1968) 5
Marley v. *United States*, 567 F.3d 1030 (9th Cir.), cert. denied, 558 U.S. 1076 (2009) 6, 8, 11
McNeil v. *United States*, 508 U.S. 106 (1993) 10
Perez v. *United States*, 167 F.3d 913 (5th Cir. 1999) 3
Reddick v. *United States*, No. 13-cv-1027, 2014 WL 87903 (W.D. Ark. Jan. 9, 2014) 7
Schmidt v. *United States*:
901 F.2d 680 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991) 4
933 F.2d 639 (8th Cir. 1991) 5
994 F.2d 843 (8th Cir. 1993), cert. denied, 510 U.S. 1071 (1994) 8

Cases—Continued: Page

Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) 2
T.L. v. *United States*, 443 F.3d 956 (8th Cir. 2006) 6
Thomas v. *United States Parole Comm'n*, No. 03-5289, 2004 WL 758966 (D.C. Cir. Apr. 7, 2004) 8
Toomey v. *United States*, No. 12-111, 2013 WL 495470 (E.D. Ky. Feb. 8, 2013) 7
Waltz v. *United States*, 415 Fed. Appx. 782 (9th Cir.), cert. denied, 132 S. Ct. 107 (2011) 8, 11
Wilson v. *United States Penitentiary Leavenworth*, 450 Fed. Appx. 397 (5th Cir. 2011) 8
Wong v. *Beebe*, 732 F.3d 1030 (9th Cir. 2013) 1

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2401(b) 1, 8
Tucker Act, ch. 359, 24 Stat. 505 ..... 7, 10

Miscellaneous:

H.R. Rep. No. 276, 81st Cong., 1st Sess. (1949) 11

In the Supreme Court of the United States

No. 13-1074

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

No. 13-1075

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In a one-two punch, the Ninth Circuit has overruled circuit precedent and held that both of the time bars in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), are nonjurisdictional limitations periods subject to equitable tolling. Those decisions are incorrect. The shifting treatment of the FTCA time bars within the Ninth Circuit and the fractured en banc decision in *Wong* v. *Beebe*, 732 F.3d 1030 (2013), exemplify the widespread confusion that has unfolded among and within the courts of appeals. This Court's

intervention would provide much needed clarity. Respondents' arguments to the contrary lack merit.

1. Respondents primarily contend (Wong Br. in Opp. 11-25; June Br. in Opp. 9-15) that this Court's review is not warranted because there is no circuit conflict on the questions presented. Respondents finely parse the courts of appeals' decisions and declare that the law is "settled" (Wong Br. in Opp. 15) and "uniform" (June Br. in Opp. 12). A fair reading of the numerous circuit decisions addressing the nature of the FTCA's time limits belies those assertions.

a. Respondents argue (Wong. Br. in Opp. 14; June Br. in Opp. 10-11) that at least seven courts of appeals now agree that the FTCA time limits are subject to equitable tolling. But respondents do not dispute that four of those courts have also held that the FTCA time limits are jurisdictional. See June Pet. 21. Those decisions squarely conflict with decisions of the Third, Seventh, and Ninth Circuits holding that the FTCA time limits are *not* jurisdictional. *Id.* at 20-21.

Respondents assert that the decisions are nevertheless "uniform" because the courts simply used "different legal reasoning to arrive at the same conclusion." Wong Br. in Opp. 15; see June Br. in Opp. 11-12. Respondents, however, do not dispute that this Court's recent case law renders any such "reasoning" fatally flawed. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (*Auburn Regional*) (if a time bar is "jurisdictional," there can "be no equitable tolling"); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-134 (2008). Although Wong suggests (at 16-17) that this Court should wait and see how those four circuits choose to reconcile their irreconcil-

able holdings, the current state of the law presents a square conflict warranting the Court's review.

June attempts (at 11) to group the Fifth and Sixth Circuits with the others discussed above but, as explained in the certiorari petitions, cases in those circuits go both ways.[1] See June Pet. 22. Respondents' attempts to reconcile the competing case law within those circuits are unpersuasive. June contends (at 13-14) that *Perez* v. *United States*, 167 F.3d 913 (1999), provides the "governing rule" in the Fifth Circuit and that *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185 (2011), decided only "the antecedent issue" of when the claim accrued. But immediately after discussing accrual, the court "also" rejected the plaintiff's "equitable tolling" claim. *Id.* at 190-191. District courts in the Fifth Circuit thus describe circuit law as "unsettled." *Carter* v. *McHugh*, 869 F. Supp. 2d 784, 787-788 (W.D. Tex. 2012).

Respondents also contend (Wong Br. in Opp. 18-20; June Br. in Opp. 14-15) that *Glarner* v. *United States*, 30 F.3d 697 (1994), is controlling precedent in the Sixth Circuit. But just this month the Sixth Circuit again acknowledged, in what will be a published decision, that the questions "whether equitable tolling applies to the FTCA's limitations period" and whether "the time limitations in the FTCA are jurisdictional in nature" have "prompted some variance within this

---

[1] June goes further still and suggests (at 11 n.4) that "even the circuits that have not formally reached the issue indicate that tolling is proper." But those courts simply assumed *arguendo* that equitable tolling may be available, while expressly noting that the issue remained open and undecided. See June Pet. 22. That does not constitute tacit approval.

circuit." *Jackson* v. *United States*, No. 13-1243, 2014 WL 1876240, at *6 & n.4 (May 12, 2014).

b. As the government explains in its petitions, the courts of appeals uniformly treated the FTCA time limits as jurisdictional for decades after the statute's enactment. See June Pet. 13 n.5, 20. June ignores those cases entirely.[2] Wong acknowledges them, but argues that the courts did not hold that "*because* the [S]ection 2401(b) limitations periods were jurisdictional, equitable tolling was not available." Br. in Opp. 21 (emphasis added). Even if that were true, it is not clear why the courts' failure to link the two principles has any bearing on the questions presented here.

Contrary to Wong's suggestion (at 21 n.15), the "jurisdictional" label was not merely descriptive; it had real consequences. For example, in *Schmidt* v. *United States*, 901 F.2d 680, 682 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991), neither party could establish when the administrative notice denying plaintiffs' claim had been mailed. The court initially dismissed the FTCA claim because the plaintiffs had the "burden of establishing subject matter jurisdiction" and they failed to satisfy that burden. *Id.* at 683. When the panel later held that "the FTCA's statute of limitations is not jurisdictional," following this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), it reversed because the government now bore the burden of establishing the nonju-

---

[2] June's congressional acquiescence argument (at 9, 12-13) cannot be squared with that case law. When Congress amended the FTCA's "presentment requirement" (*id.* at 12), the courts of appeals had consistently held that the time limits were jurisdictional. That Congress did nothing to alter that understanding cuts strongly against respondents' position.

risdictional limitations defense. *Schmidt* v. *United States*, 933 F.2d 639, 640 (8th Cir. 1991); see also, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). Moreover, as Wong acknowledges (at 22 n.15), several courts of appeals *did* hold that equitable tolling of the FTCA time limits is unavailable. See also *Burns* v. *United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Houston* v. *USPS*, 823 F.2d 896, 902 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988).[3]

Wong dismisses those cases (at 20-21) because they were decided before *Irwin*. But this Court's intervening decisions are a significant reason why the law remains unsettled. The Ninth Circuit provides a prime example. For decades after the FTCA's enactment, the Ninth Circuit characterized the FTCA time limits as "jurisdictional," attached jurisdictional consequences to untimely claims, and held that equitable tolling was not available. See, *e.g.*, *Hart* v. *United States*, 817 F.2d 78, 80 (1987); *Burns*, 764 F.2d at 724; *Mann* v. *United States*, 399 F.2d 672, 673 (1968). After *Irwin*, the Ninth Circuit changed course and held that equitable tolling was available for FTCA

---

[3] Contrary to Wong's contention (at 22 n.15), neither the First nor the Fourth Circuit actually "permitted tolling." The discussions of government misconduct were relevant only to determining the appropriate accrual date. See *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 248-250 (1st Cir. 1990); *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-747 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991). And Wong's discussion of *Charlton* v. *United States*, 743 F.2d 557 (7th Cir. 1984), ignores the plaintiff's "first count"—which involved the six-month statutory deadline, not a regulation governing exhaustion, and which resulted in a dismissal "for lack of subject matter jurisdiction." *Id.* at 558-559.

claims. *Alvarez-Machain* v. *United States*, 107 F.3d 696, 701 (1996), cert. denied, 522 U.S. 814 (1997). Then, after *John R. Sand & Gravel*, the Ninth Circuit reverted to its initial assessment and held (again) that the FTCA time limits are jurisdictional and are not subject to equitable tolling. *Marley* v. *United States*, 567 F.3d 1030, 1032, 1034-1038, cert. denied, 558 U.S. 1076 (2009). Now, just a few years later, the Ninth Circuit has reversed course yet again and held that the time limits are not jurisdictional and that they are subject to equitable tolling. Wong Pet. App. 1a-102a; June Pet. App. 1a-2a; *Gallardo* v. *United States*, No. 12-55255, 2014 WL 1424469, at *4 (9th Cir. Apr. 15, 2014).[4]

c. The longstanding confusion among and within the courts of appeals cannot be dismissed as mere intracircuit conflicts. Wong Br. in Opp. 18; June Br. in Opp. 15. That seriously understates the duration and magnitude of the problem. As the sheer number of published appellate decisions cited in the petition-stage briefs highlight, these issues have arisen with remarkable frequency. And as courts continue to consider the issues or reconsider circuit precedent in light of whatever might be the Court's most recent decision on the general subject, the questions presented will continue to burden the judiciary and the United States. The Court should definitively resolve the question whether the time bars for tort claims against the United States under the FTCA are jurisdictional and not subject to equitable tolling, just as it did in *John R. Sand & Gravel* with respect to the

[4] Such shifting (and, at times, incompatible) jurisprudence is not unique to the Ninth Circuit. See, *e.g.*, *T.L.* v. *United States*, 443 F.3d 956, 959-961 (8th Cir. 2006).

other general category of monetary claims against the United States, *non*-tort claims under the Tucker Act.[5]

2. Wong contends (at 11-13, 25-28) that most of the courts of appeals' decisions involve the two-year deadline for filing an administrative claim, not the six-month court filing deadline; that the United States has distinguished the two FTCA time limits in prior filings; and that "[d]isputes about tolling of the six-month limitations period" are "extremely uncommon." Those arguments are unavailing and do not counsel against further review of the decision in *Wong*.

As an initial matter, there has been no "paucity of tolling disputes" (Wong Br. in Opp. 27) involving the six-month deadline. In the last two years alone, dozens of district courts have adjudicated requests to toll the FTCA's six-month time bar in decisions that (while often unpublished) are readily available on Westlaw.[6] And the Tenth Circuit is not the only court of appeals to have addressed the issue. *Id.* at 11-12, 26-27 (discussing *Benge* v. *United States*, 17 F.3d 1286

---

[5] Another petition for a writ of certiorari raising the question of equitable tolling of the FTCA's two-year time bar is currently pending before the Court. See *Sanchez* v. *United States*, No. 13-1249 (filed Apr. 14, 2014).

[6] See, *e.g.*, *Alexander* v. *United States*, No. 14-cv-0137, 2014 WL 1871859, at *2 (S.D. Cal. May 5, 2014); *Abdelmoneim* v. *Department of the Army*, No. 12-cv-5268, 2014 WL 1277905, at *3 (E.D.N.Y. Mar. 27, 2014); *Hill* v. *United States*, No. 13-cv-307, 2014 WL 675498, at *1 (S.D. Ill. Feb. 21, 2014); *Reddick* v. *United States*, No. 13-cv-1027, 2014 WL 87903, at *2 (W.D. Ark. Jan. 9, 2014); *Hall* v. *United States*, No. 12-1387, 2013 WL 4047578, at *2 (D. Kan. Aug. 9, 2013); *Adderson* v. *United States*, No. 12-cv-395, 2013 WL 3717731, at *2 (N.D. Fla. July 16, 2013); *Toomey* v. *United States*, No. 12-111, 2013 WL 495470, at *2 (E.D. Ky. Feb. 8, 2013).

(10th Cir. 1994)). As Wong appears to recognize (at 12-13), the Ninth Circuit has confronted requests to equitably toll the six-month time bar at least three times over the last four years. See Wong Pet. App. 1a-102a; *Waltz* v. *United States*, 415 Fed. Appx. 782 (9th Cir.), cert. denied, 132 S. Ct. 107 (2011); *Marley*, *supra*. And at least seven other courts of appeals have considered similar claims over the last two decades.[7]

As Wong correctly notes (at 8-11, 12-13), the United States did argue against the Court's review in two earlier cases involving the FTCA's six-month court filing deadline. The government noted that there was "no direct conflict that warrants this Court's intervention" because (i) the conflicting cases did not involve the "six-month limitations period," and (ii) the Court had only recently decided *John R. Sand & Gravel* and most courts had not had the opportunity to consider that decision. Br. in Opp. at 8-10, *Marley*, *supra* (No. 09-270); see Br. in Opp. at 9-10, *Waltz*, *supra* (No. 10-1436). In the ensuing years, however, no court has seen fit to distinguish between the six-month and the two-year time limits in Section 2401(b), and the Ninth Circuit has now expressly rejected any such distinction. See June Pet. App. 1a-2a; *Gallardo*,

---

[7] See, *e.g.*, *de Casenave* v. *United States*, 991 F.2d 11, 12-14 (1st Cir. 1993); *Goldblatt* v. *National Credit Union Admin.*, 502 Fed. Appx. 53, 55-56 (2d Cir. 2012); *Wilson* v. *United States Penitentiary Leavenworth*, 450 Fed. Appx. 397, 399 (5th Cir. 2011) (per curiam); *Jackson*, 2014 WL 1876240, at *2, *5-*7 (6th Cir.); *Schmidt* v. *United States*, 994 F.2d 843, 843 (8th Cir. 1993) (per curiam), cert. denied, 510 U.S. 1071 (1994); *Hill* v. *United States*, 296 Fed. Appx. 921, 921 (11th Cir. 2008) (per curiam), cert. denied, 558 U.S. 874 (2009); *Thomas* v. *United States Parole Comm'n*, No. 03-5289, 2004 WL 758966, at *1 (D.C. Cir. Apr. 7, 2004) (per curiam).

2014 WL 1424469, at *4. Six years after this Court's decision in *John R. Sand & Gravel*, uncertainty remains. The Court now has the opportunity to resolve both questions and to bring much needed clarity to this area of the law.

3. The twin decisions of the Ninth Circuit holding that both of the FTCA time bars are nonjurisdictional limitations periods subject to equitable tolling are wrong. To the extent Wong addresses the merits at all (at 29-31), she focuses on the phrase "shall be forever barred" in isolation and ignores the historical and contextual significance of that specific language in statutes authorizing suits against the United States itself for money damages: "Section 2401(b) contains emphatic language ('shall be forever barred') that was patterned after the jurisdictional limitation on Tucker Act suits"—which this Court has consistently held to be jurisdictional in a line of cases beginning with *Kendall* v. *United States*, 107 U.S. 123 (1883), and reaffirmed in *John R. Sand & Gravel*—and that was "historically linked to the FTCA's jurisdiction-granting provision." Wong Pet. 17 (citations omitted).

June attempts a more extended defense of the decision below (at 16-28), but she too fails to acknowledge the weight of countervailing authorities. For example, June relies heavily on the presumption in favor of equitable tolling (arguing that the presumption is "even stronger" in the context of administrative filings than it is for "court action[s]"), *id.* at 9-10, 16-18, 27, without acknowledging this Court's recent decision in *Auburn Regional* rejecting that presumption, and equitable tolling, in the context of a filing with an administrative agency. See June Pet. 15. June then makes an argument concerning the text,

structure, and purposes of the two-year time limit for filing an administrative claim, Br. in Opp. 18-22, without appreciating the significance of the particular text Congress chose and without placing the text, structure, and purposes of the time bars in their proper statutory and historical contexts—which powerfully support their jurisdictional force. See June Pet. 7-13.

As for the close relationship between the FTCA and the Tucker Act, June dismisses *John R. Sand & Gravel* as "sui generis." Br. in Opp. 23. But that misses the fundamental point. Congress enacted and subsequently amended the FTCA time limits against the backdrop of this Court's precedents declaring the directly parallel Tucker Act time limit to be jurisdictional. And when June does turn to the statutory history, she does not dispute that the FTCA time limits *were* jurisdictional as enacted. Her only response is that the two-year deadline for filing an administrative claim did not exist at that time. *Id.* at 24-25. But the administrative claims-presentment and exhaustion requirements and accompanying two-year deadline were plugged into the FTCA's already existing framework, and indeed the claims-presentment and exhaustion requirements are treated as jurisdictional prerequisites to suit. See *McNeil* v. *United States*, 508 U.S. 106, 109-113 (1993); June Pet. 15-16. Understood in this broader context, Congress clearly intended to enact absolute, jurisdictional time bars for FTCA claims.[8]

---

[8] June also contends that "Congress crafted the time limit on presenting administrative claims with equity in mind" (at 17-18), but the 1949 House Report on which she relies merely explains why Congress extended the suit-filing period from one year to two years—*i.e.*, because "the existing limitation of 1 year" was "not in

4. Finally, respondents both argue against consolidation. Wong Br. in Opp. 32-34; June Br. in Opp. 30-32. Respondents contend that the government's request for consolidation "is in some tension" with its "position in *Marley*," "*Waltz*" and *June*. Wong. Br. in Opp. 33; June Br. in Opp. 30-32. Not so. The government's primary argument then and now is that "both the two-year and the six-month limitations provisions of 28 U.S.C. 2401(b) are properly considered jurisdictional in nature, and thus are not subject to equitable tolling." Br. in Opp. at 9, *Marley*, *supra* (No. 09-270); Br. in Opp. at 10, *Waltz*, *supra* (No. 10-1436). The government has suggested, in the alternative, certain distinctions between the FTCA's two time limits—but no court of appeals has adopted those distinctions and the Ninth Circuit in *June* (and in a later published decision) expressly rejected them. See p. 8, *supra*. To be sure, the parties here may seek to highlight those differences if the Court grants review. But, as the government's petitions demonstrate, the arguments substantially overlap. And the Court could accommodate any differences between respondents by allowing division of their argument time.

---

consonance with the practice prevailing in analogous departments of the law." H.R. Rep. No. 276, 81st Cong., 1st Sess. 3-4 (1949). The Report says nothing about equitable tolling, let alone equitable tolling of the not-yet-enacted two-year mandatory administrative filing deadline.

* * * * *

For the foregoing reasons, and those stated in the petitions for a writ of certiorari, the petitions should be granted and the cases consolidated for briefing and argument.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2014

JOINT APPENDIX

No. 13-1074

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record
for Petitioner

ERIC SCHNAPPER
University of Washington,
School of Law
P.O. Box 353020
Seattle, Wa. 98195
schnapp@u.washington.edu
(206) 616-3167

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: MAR. 7, 2014
CERTIORARI GRANTED: JUNE 30, 2014

TABLE OF CONTENTS

Page

Court of appeals docket entries 1
District court docket entries 7
Wong administrative claim (May 18, 2001) 23
Wu-wei Tien Tao Association administrative claim (May 18, 2001) 27
Chong Hua Sheng Mu Gong administrative claim (May 18, 2001) 30
Complaint (May 18, 2001) 33
First amended complaint (Oct. 16, 2001) 46
Motion to allow filing of second amended complaint (Nov. 9, 2001) 60
[Proposed] Second amended complaint (Nov. 9, 2001) 63
Memorandum in support of defendants' opposition to plaintiffs' motions to allow filing of second complaint (Nov. 30, 2001) 78
Letter from Julie L. Hecht to Beth Creighton and certified mail receipt (Dec. 3, 2001) 85
Reply memorandum to defendants' opposition to motion to allow filing of second amended complaint (Dec. 10, 2001) 88
Second amended complaint (Aug. 13, 2002) 94
Defendants' opposition to filing the Aug. 13, 2002 so-called second amended complaint and motion to properly title the Aug. 13, 2002 complaint (Aug. 27, 2002) 111

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 10-36136

KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION,
PLAINTIFF-APPELLANT

v.

DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL, UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/16/10	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 12/23/2010. Transcript ordered by 01/14/2011. Transcript due 02/14/2011. Appellant Kwai Fun Wong and Appellant Wu-Wei Tien Tao Association opening brief due 03/25/2011. Appellee David V. Beebe and Appellee United States of America answering brief due 04/25/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7582716] (WF)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/7/12	32	ARGUED AND SUBMITTED TO A. WALLACE TASHIMA, RICHARD C. TALLMAN and SANDRA S. IKUTA. [8167194] (SB)
		* * * * *
10/5/12	34	Filed order (A. WALLACE TASHIMA, RICHARD C. TALLMAN and SANDRA S. IKUTA) A sua sponte en banc call having been made by the panel, the parties are instructed to file simultaneous briefs setting forth their respective positions on whether the case should be reheard en banc within 21 days of the filing date of this order. See G.O. 5.4c(3). An original and fifty copies should be filed. See Ninth Cir. R. 35-4(b) [8350623])BJB)
		* * * * *
10/23/12	36	Filed order (A. WALLACE TASHIMA, RICHARD C. TALLMAN AND SANDRA S. IKUTA) Plaintiffs-Appellants' unopposed motion for extension of time for the parties to file their simultaneous briefs is granted. The time within which said briefs, setting forth the parties' respective positions on whether this case should be reheard en banc, shall

DATE	DOCKET NUMBER	PROCEEDINGS
		be filed is extended to November 13, 2012. [8373814] (BJB)
		* * * * *
1/3/13	44	Filed Order for PUBLICATION (ALEX KOZINSKI) Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. [8460451] (RP)
		* * * * *
1/24/13	53	Filed order (ALEX KOZINSKI) The Motion to File Limited Supplemental Brief is granted. The parties shall file supplemental briefing addressing the following: 1. Was Marley v. United States, 567 F.3d 1030, 1037-38 (9th Cir. 2009), correct in concluding that Alvarez-Machain v. United States, 107 F.3d 696 (9th Cir. 1996), was the three-judge panel opinion that the court voted to rehear en banc in Alvarez-Machain v. United States, 284 F.3d 1039 (9th Cir. 2002)? 2. Is this Court's decision in Valadez-Lopez v. Chertoff, 656 F.3d 851 (9th Cir. 2011), relevant to whether the FTCA claim was timely filed? 3. Is the six-month period in 28 U.S.C. § 2401(b), subject to

DATE	DOCKET NUMBER	PROCEEDINGS
		equitable tolling for reasons not addressed in briefing already submitted? See, e.g., Sebelius v. Auburn Reg'l Med. Ctr., No. 11-1231, 2013 WL 215485 (U.S. Jan. 22, 2013). Appellees shall file their brief no later than February 22, 2013. Appellants shall file their brief no later than March 1, 2013. Appellees may file a reply brief no later than March 8, 2013. The principal briefs may not exceed 5,000 words, and the reply brief may not exceed 2,500 words. Each party shall submit 20 paper copies of its brief on the day that it files its brief electronically. 9th Cir. R. 31-1. The paper copies must be accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. A sample certificate is available at http://www.ca9.uscourts.gov/datastore/uploads/cmecf/Certificate-for-Brief-in-Paper-Format.pdf. [8485790] (BJB)
		* * * * *
3/20/13	70	ARGUED AND SUBMITTED TO ALEX KOZINSKI, HARRY PREGERSON, A. WALLACE TASHIMA, M. MARGARET MCKEOWN, WILLIAM A. FLETCHER, MARSHA S.

DATE	DOCKET NUMBER	PROCEEDINGS
		BERZON, RICHARD R. CLIFTON, JAY S. BYBEE, CARLOS T. BEA, MILAN D. SMITH, JR. and MARY H. MURGUIA. [8558756] (TG)
		* * * * *
10/9/13	73	FILED OPINION (ALEX KOZINSKI, HARRY PREGERSON, A. WALLACE TASHIMA, M. MARGARET MCKEOWN, WILLIAM A. FLETCHER, MARSHA S. BERZON, RICHARD R. CLIFTON, JAY S. BYBEE, CARLOS T. BEA, MILAN D. SMITH, JR. and MARY H. MURGUIA) REVERSED AND REMANDED. Judge: AK Concurring, Judge: AWT Dissenting, Judge: MSB Authoring, Judge: CTB Dissenting, FILED AND ENTERED JUDGMENT. [8814691] (RP)
		* * * * *
12/3/13	77	MANDATE ISSUED. (AK, HP, AWT, MMM, WAF, MSB, RRC, JSB, CTB, MDS and MHM) Costs taxed against Appellees in the amount of $2,147.36. [8886861] (RR)

DATE	DOCKET NUMBER	PROCEEDINGS
1/2/14	78	Received letter from the Supreme Court dated 12/27/2013 regarding the application for an ext of time within which to file a petition for writ of cert . . . extended the time to and including 2/6/14. Application No: 13A653. [8923088] (RR)
1/28/14	79	Received letter from the Supreme Court dated 01/24/2014 regarding the application for a further ext of time to file a petition for writ of cert . . . extended the time to and including 3/8/14. Application No: 13A653. [8958082] (RR)
3/25/14	80	Received notice from the Supreme Court: petition for certiorari filed on 03/07/2014. Supreme Court Number 13-1074. [9029796] (RR)
7/7/14	81	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/30/2014. Supreme Court Number 13-1074. [9156977] (RR)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON (PORTLAND (3))

No. 3:01-CV-00718-BR
KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DAVID V. BEEBE, A FORMER IMMIGRATION AND NATURALIZATION SERVICE (NKA DEPARTMENT OF HOMELAND SECURITY) OFFICIAL, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/18/01	1	Complaint against Immigration & Naturalization Service, USA. *(Bivens Claims/Damages; Declaratory Judgment (Demand for Jury Trial)* Filing Fee collected. Receipt #: #437514 issued. Filed by Chong Hua Sheng Mu Gong, Kwai Fun Wong, Wu-Wei Tien Tao Association (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (Parashos, Eric). (Entered: 05/22/2001)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/17/01	30	First Amended Complaint *(Bivens/ RFRA Damage Claims; Declaratory Judgment) Demand for Jury Trial.* Filed by Chong Hua Sheng Mu Gong, Kwai Fun Wong, Wu-Wei Tien Tao Association against Douglas Glover, Jack O'Brien, Jerry F. Garcia, David V. Beebe, Immigration & Naturalization Service, USA. (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (Parashos, Eric). (Entered: 10/22/2001)
		* * * * *
11/9/01	44	Motion to Alter/Amend/Correct *Motion to Allow Filing of Second Amended Complaint / Declaration of Counsel.* Filed by all plaintiffs. (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (Parashos, Eric). (Entered: 11/13/2001)
11/14/01	45	**Record of ORDER by Judge Stewart:** Denying as moot, Defendant's motion for extension of time to respond to plaintiffs' motions filed on 10/29/2001, # 43. Order—Granting Plaintiff's motion to allow filing of second amended complaint, (Related Doc #

DATE	DOCKET NUMBER	PROCEEDINGS
		44. (Related documents(s) 43) (da,) (Entered: 11/14/2001)
		* * * * *
11/14/01	46	Amended Motion to Alter/Amend/ Correct *Amended Motion to Allow Filing of Second Amended Complaint / Declaration of Counsel.* Filed by all plaintiffs. (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 11/20/2001)
11/19/01	48	Memorandum in Opposition *to Defendants Motion to Dismiss Plaintiffs First Amended Complaint (Oral Argument Requested).* Filed by all plaintiffs. (Related motion(s) 31) (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 11/21/2001)
11/20/01	47	**CIVIL MINUTES:** Record of Order by Judge Stewart - Setting Plaintiff's amended motion to allow filing of 2nd amended complaint, (Related documents(s) 46), for oral argument before Judge Stewart on 12/17/2001 at 09:30 AM by Telephone. (da,) (Entered: 11/20/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
11/30/01	49	Memorandum in Opposition *to Plaintiffs Motion to Allow Filing of Second Amended Complaint.* Filed by all defendants. (Related motion(s) 46) (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 12/03/2001)
11/30/01	50	Memorandum in Support *of Defendants Opposition to Plaintiffs Motions to Allow Filing of Second Amended Complaint.* Filed by all defendants. (Related document(s) 49) (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 12/03/2001)
12/10/01	51	Reply Memorandum in Opposition *to Motion to Allow Filing of Second Amended Complaint.* Filed by all plaintiffs. (Related motion(s) 46) (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 12/12/2001)
		* * * * *
4/5/02	62	ORDER: Defendants' Motion to Stay Discovery Until After the Court Rules on Defendants' Motion to Dis-

DATE	DOCKET NUMBER	PROCEEDINGS
		miss (docket #20) is DENIED; Plaintiffs' Motion to Compel (docket #33) is GRANTED, subject to adoption of these Findings and Recommendations by a district court judge; Plaintiffs' Motion to Stay Consideration of Defendants' Motion to Dismiss Until Plaintiffs (a) are Allowed to File Their Amended Complaint; and (b) are Allowed Discovery (docket #34) is DENIED; Plaintiffs' Amended Motion to Allow Filing of Second Amended Complaint (docket #46) is GRANTED; and Defendants' Motion for Clarification (docket #53) is GRANTED, and this court's minute order dated November 14, 2001 (docket #45) is amended by replacing the last sentence of that minute order with the following sentence: "Order - Granting Plaintiff's Motion to Alter, Amend, or Correct their Motion to Allow Filing of Second Amended Complaint (Related Document #44)" to clarify that plaintiffs were not given leave to file their Second Amended Complaint. Findings & Recommendations: defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (docket #31) should be DENIED, and plain-

DATE	DOCKET NUMBER	PROCEEDINGS
		tiffs should be ordered to replead their claims to specify which underlying factual allegations they rely on for each of their Bivens claims and to replead their claim for delaratory relief. Signed on 4/5/2002 by Judge Janice M. Stewart. Objections to the Findings and Recommendation due by 4/26/2002. Response to the objection to the F & R due by 5/13/2002. (Related document(s) 31, 53, 20, 33, 34, 46) (stewart1,) (Entered: 04/05/2002)
4/26/02	63	Objections to Findings & Recommendation. Filed by all defendants. Response to the objection to the F & R due by 5/12/2002. (Related motion(s) 62) (Kirk,) (Main Document 63 replaced on 4/23/2012) (eo). (Entered: 04/29/2002)
		* * * * *
5/15/02	68	Response to Objections to Findings & Recommendation *by Judge Stewart 4/5/02*. Filed by all plaintiffs. (Related motion(s) 62) (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 05/17/2002)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/25/02	69	**ORDER:** Order Denying Motion to Dismiss (Related Doc # 31), Order Adopting Findings and Recommendation: (Related Doc # 62) Signed on 6/25/2002 by Judge Robert E. Jones. (da,) (Entered: 06/25/2002)
		* * * * *
7/2/02	70	Motion for Stay *Defendants' motion to stay proceedings pending a decision on whether to appeal the June 25, 2002 order of the District Court Judge.* Filed by all defendants. (da,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 07/05/2002)
7/2/02	71	Memorandum in Support *of motion to stay proceedings pending a decision on whether to appeal the June 25, 2002 order of the District Court Judge.* Filed by all defendants. (Related document(s) 70) (da,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 07/05/2002)
		* * * * *
7/16/02	73	**Record of ORDER by Judge Stewart:** Granting Plaintiff's motion,# 72), for extension of time to file response to

DATE	DOCKET NUMBER	PROCEEDINGS
		Defendants' motion to stay proceedings pending a decision on whether to appeal the June 25, 2002 order of the District Court Judge # 70. ORDER —Plaintiff's response due by 8/5/2002 and defendant's reply due by 8/19/2002. ORDER—setting Defendants' motion to stay, # 70 , to be taken under advisement by Judge Stewart on 8/26/2002. (Related documents(s) 70) (da,) (Entered: 07/16/2002)
7/24/02	74	Notice of Appeal to USCA from the Order # 69 entered on 6/25/02. Filed by all defendants. (Fee waived) (Related document(s) 69) (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 07/24/2002)
		* * * * *
7/25/02	76	**ORDER**: Based on the filing of defendants' Notice of Appeal, the Motion to Stay (Related Doc # 70) is DENIED AS MOOT. by Judge Janice M. Stewart. (stewart1,) (Entered: 07/25/2002)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/2/02	78	Motion for Stay *of All Proceedings Pending a Final Decision by the 9th Circuit on Defendants Pending Appeal.* Filed by all defendants. (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 08/05/2002)
8/2/02	79	Memorandum in Support *of Motion to Stay All Proceedings Pending a Final Decision by the 9th Circuit on Defendants Pending Appeal.* Filed by all defendants. (Related document(s) 78) (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 08/05/2002)
8/7/02	80	**Record of ORDER by Judge Stewart:** Setting Defendants' motion to stay all proceedings pending a final decision by the Ninth Circuit on Defendants' pending appeal, #78, to betaken under advisement by Judge Stewart on 9/9/2002. ORDER: When submitting dispositive motions and memoranda to the Court, the parties not participating in ECF (Electronic Case Filing) shall either file (in a format compatible with Word Perfect) a disk containing their motions and memor-

DATE	DOCKET NUMBER	PROCEEDINGS
		anda, excluding exhibits, or send copies by e-mail to Donna_Ausbie@ord.uscourts.gov. A MOTION, RESPONSE, OR REPLY WHICH FAILS TO COMPLY WITH THIS ORDER WILL BE STRICKEN (Related documents(s) 78) (da,) (Entered: 08/07/2002)
		* * * * *
8/13/02	83	Second Amended Complaint - *Bivens/Damage Claims/Declaratory Judgment (Demand for Jury Trial).* Filed by Chong Hua Sheng Mu Gong, Kwai Fun Wong, Wu-Wei Tien Tao Association against David V. Beebe, Jerry F. Garcia, Douglas Glover, Immigration & Naturalization Service, Jack O'Brien, USA. (Kirk,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 08/14/2002)
8/16/02	84	Response to Motion *in Opposition to Defendants' Motion to Stay all Proceedings Pending a Final Decision by the Ninth Circuit on Defendants' Pending Appeal and Memorandum of Law Supporting Plaintiffs' Motion for Certification to the Court of Ap-*

DATE	DOCKET NUMBER	PROCEEDINGS
		peals that the Appeal is Frivolous. Filed by all plaintiffs. (Related motion(s) 78) (rtrb,) (Additional attachment(s) added on 5/23/2012: # 1 Main Document) (msk). (Entered: 08/21/2002)
		* * * * *
8/27/02	88	Objection(s) *Opposition to Filing the 8/13/02 so-called Second Amended Complaint & Motion to Properly Title the 8/13/02 Complaint.* Filed by all defendants. (Related document(s) 83) (Kirk,) (Additional attachment(s) added on 5/22/2012: # 1 Main Document) (msk). (Entered: 09/04/2002)
11/25/02	98	Opinion & Order: Plaintiffs Motion to Certify is Denied & Defendants Motion to Stay is Granted. This case is stayed pending a decision by the 9th Circuit Court of Appeals. Signed 11/25/02 by Judge Robert E. Jones. Signed 11/25/02 (Related document(s) 85, 78) (Kirk,) (Entered: 12/04/2002)
10/21/05	206	Cross Motion for Summary Judgment *in favor of the United States.* Oral Argument requested Filed by USA. (Sher, R.) (Entered: 10/21/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
2/14/06	325	Findings & Recommendation: Plaintiff Wong's Motion for Partial Summary Judgment 192 should be denied and the United States Cross-Motion for Summary Judgment on Wong's False Imprisonment Claim 206 should be granted without prejudice and with leave granted to Wong to replead her FTCA claim. Objections to the Findings and Recommendation are due by 3/6/2006. Signed on 2/14/2006 by Judge Janice M. Stewart. (St,) (Entered: 02/14/2006)
		* * * * *
4/10/06	358	**ORDER:** Signed on 4/10/2006 by Judge Robert E. Jones. Adopting Findings and Recommendation, # 325, Denying Motion for Partial Summary Judgment, # 192), Granting Motion for Summary Judgment, # 206. SEE ORDER. (da,) (Entered: 04/11/2006)
		* * * * *
8/16/10	504	Motion for Reconsideration of Order on Findings & Recommendation, Or-

DATE	DOCKET NUMBER	PROCEEDINGS
		der on motion for partial summary judgment, Order on motion for summary judgment 358 . Filed by USA. (Richter, Zachary) (Entered: 08/16/2010)
8/16/10	505	Memorandum in Support *of United States' Motion for Reconsideration.* Filed by USA. (Related document(s): Motion for Reconsideration 504.) (Richter, Zachary) (Entered: 08/16/2010)
		* * * * *
9/8/10	509	Memorandum in Opposition *to United States' Motion for Reconsideration.* Filed by Kwai Fun Wong, Wu-Wei Tien Tao Association. (Creighton, Beth) (Entered: 09/08/2010)
9/22/10	510	Reply to Motion for Reconsideration of Order on Findings & Recommendation, Order on motion for partial summary judgment, Order on motion for summary judgment 358 504 . Filed by USA. (Richter, Zachary) (Entered: 09/22/2010)
		* * * * *
10/28/10	512	**ORDER:** Granting Motion for Reconsideration 504. Plaintiff having

DATE	DOCKET NUMBER	PROCEEDINGS
		no surviving claims, this action is dismissed with prejudice. Any other pending motions are denied as moot. Signed on 10/28/10 by Judge Robert E. Jones. (dmd) (Entered: 10/28/2010)
10/28/10	513	Judgment. Based upon the record, IT IS ORDERED AND ADJUDGED this action is dismissed with prejudice. Signed on 10/28/10 by Judge Robert E. Jones. (dmd) (Entered: 10/28/2010)
		* * * * *
12/15/10	516	Notice of Appeal to the 9th Circuit Filing fee in amount of $455 collected; Receipt No. 37636 issued. Filed by Kwai Fun Wong and Wu-Wei Tien Tao Association. (dmd) (Entered: 12/16/2010)
12/16/10	517	Order for Administrative Correction of the Record regarding Notice of Appeal 516 filed by Kwai Fun Wong, Chong Hua Sheng Mu Gong. A Clerical error has been discovered in the case record. In accordance with Fed. R. Civ. P. 60(a), the Clerk is directed to make the following administrative corrections to the record and

DATE	DOCKET NUMBER	PROCEEDINGS
		to notify all parties accordingly. Notice of Appeal was filed by Kwai Fun Wong and Wu-Wei Tien Tao Association. Chong Hua Sheng My Gong was incorrectly entered as a filer. (dmd) (Entered: 12/16/2010)
12/16/10		USCA Case Number and Notice confirming Docketing Record on Appeal re Notice of Appeal (# 516). **Case Appealed To 9th Circuit Court of Appeals. Case Number 10-36136** assigned. (eo) (Entered: 12/16/2010)
		* * * * *
12/3/13	527	MANDATE of USCA for the 9th Circuit, **USCA # 10-36136**, re Notice of Appeal 516 . The decision of the District Court is REVERSED AND REMANDED. (Attachments: # 1 Attachment Opinion) (schm) (Entered: 12/04/2013)
		* * * * *
7/7/14	540	**ORDER:** Based on the Supreme Court's grant of the government's Petition for Writ of Certiorari (as reported in the parties' Joint Status Report 539), the Court continues the stay in this matter pending further

DATE	DOCKET NUMBER	PROCEEDINGS
		order of this Court. The parties shall file an updated Joint Status Report on the earlier of (1) January 16, 2015; (2) when significant developments occur in the Supreme Court proceedings; or (3) at the request of any party. Ordered by Judge Anna J. Brown. (mr) (Entered: 07/07/2014)

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Department of Justice
Immigration and Naturalization Service

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
Kwai Fun Wong
c/o Beth Creighton, Tom Steenson
815 SW Second Avenue, Suite 500
Portland, Oregon 97204

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	1/5/59	Single	5/20/99-6/22/99	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

See attached

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See above

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
David Beebe Douglas Glover Jerry Garcia Jack O'Brien	

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	$1,000,000.00		$1,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Beth Creighton attorney for claimant	503-221-1792	5/18/01

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
Claimant shall forfeit and pay to the United States the sum of $2,000, plus the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109
Previous editions not usable.

NSN 7540-00-634-4046

STANDARD FORM 95 (REV. 2-91)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

Exhibit 6

23

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. Authority: The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. Principal Purpose: The information requested is to be used in evaluating claims.

C. Routine Use: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. Effect of Failure to Respond: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, if yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

No

17. If deductible, state amount

n/a

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you attach these facts)

19. Do you carry public liability and property damage insurance? ☐ Yes, if yes, give name and address of insurance carrier (Number, street, city, State, and Zip Code) ☐ No

Claimant is a citizen of Hong Kong. She is the Matriach of the Tao Heritage and the leader of the Wu-Wei Tien Tao association. She entered the United States in 1985 as a Tao Minister and applied with the Immigration and Naturalization Service ("INS") for special immigrant status as a Tao Minister in 1992 and in 1994. As of March 27, 1999, Complainant did not receive notification as to whether her special immigrant status had been approved or denied.

On or about March 27, 1999, claimant was compelled to unexpectedly leave the United States to fulfill her duties as the Matriarch of the Tao Heritage. On or about April 28, 1999, claimant attempted to lawfully reenter the United States to continue her religious mission. She was paroled into the United States by the INS and was granted deferred inspection. On or about April 20, 1999, claimant applied for an adjustment of status under INA, Section 245(i). Thereafter, claimant's parole was revoked. This revocation was improper because her application for an adjustment of status was still pending. Additionally, on or about May 20, 1999, claimant was subjected to expedited removal proceedings. Under the applicable immigration law, expedited removal was improper because claimant's application for adjustment of status was still pending. Claimant was arrested by the INS and detained during the course of the expedited removal proceedings. The detention of claimant was unreasonable since the INS did not have any reason to believe that claimant was not admissible.

While detained, claimant was strip searched and denied vegetarian food which interfered with the practice of her faith.

Claimant was removed from the United States on June 22, 1999.

As a result of the negligence of the INS and the INS's unlawful arrest, detention and removal of claimant, she has incurred attorney fees and other out-of-pocket expenses.

As a result of the described conduct, claimant has been forced to endure distress, embarrassment and humiliation. She has also suffered a loss to her reputation.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

Department of Justice
Immigration & Naturalization Service

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)

Wu-wei Tien Tao Association
c/o Beth Creighton, Tom Steenson
815 SW Second Avenue, Suite 500
Portland, Oregon 97204

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
			5/20/99-6/22/99	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

See attached

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See above

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
David Beebe Douglas Glover Jerry Garcia Jack O'Brien	

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	$1,000,000.00		$2,500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Beth Creighton Of Attorneys for Claimant	503 221-1792	5/18/01

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109
Previous editions not usable.

NSN 7540-00-634-4648

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

Exhibit 7

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. Authority: The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. Principal Purpose: The information requested is to be used in evaluating claims.

C. Routine Use: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. Effect of Failure to Respond: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or hospitalization, claiming incurred for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(c) In support of claims for damage to property which is economically repairable, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the alleged accident occurred may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (3060-0672)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number. ☐ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

No

17. If deductible, state amount

n/a

18. If claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts)

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier (Number, street, city, State, and Zip Code) ☐ No

28

Claimant is a non-profit religious organization. Kwai Fun Wong is the Matriach of the Tao Heritage and the claimant's leader. Claimant petitioned for Kwai Fun Wong to receive special immigrant status as a Tao Minister in 1992, 1994 and 1999.

On or about April 29, 1999, the INS revoked claimant's leader's parole. On or about June 17, 1999, the INS detained claimant's leader. On or about June 22, 1999, the INS subjected claimant's leader to expedited removal. This revocation, detention and removal of their leader was improper because her application for adjustment of status was still pending.

The INS used improper means, including, but not limited to, of revocation of parole, detention and removal of claimant's leader which interfered with claimant's existing business relations. In addition, the INS acted with an improper purpose in the revocation of parole, detention and removal of claimant's leader. As a result of INS's actions, claimant has incurred attorney fees and other out-of-pocket expenses.

As a result of INS's intentional actions, claimant's right to practice its religion and its administration has been severely damaged. In addition it has suffered severe damage to its reputation and significant loss of membership and donations.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

Department of Justice
Immigration & Naturalization Service

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)

Chong Hua Sheng Mu Gong
c/o Beth Creighton, Tom Steenson
815 SW Second Avenue, Suite 500
Portland, Oregon 97204

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
			5/20/99-6/22/99	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

See attached

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See above

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
David Beebe Douglas Glover Jerry Garcia Jack O'Brien	

12. (See instructions on reverse) AMOUNT OF CLAIM (In dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	$3,000,000.00		$2,500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Beth Creighton Of Attorneys for Claimant	503 221-1792	5/18/01

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

Claimant shall forfeit and pay to the United States the sum of $2,000, plus the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109
Previous editions not usable.

NSN 7540-00-634-4046

Exhibit 8

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

30

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. Authority: The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. Principal Purpose: The information requested is to be used in evaluating claims.

C. Routine Use: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. Effect of Failure to Respond: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably repairable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (2000-0002)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, if yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number. ☐ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

No

17. If deductible, state amount

n/a

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you ascertain these facts)

19. Do you carry public liability and property damage insurance? ☐ Yes, if yes, give name and address of insurance carrier (Number, street, city, State, and Zip Code) ☐ No

Claimant is a non-profit religious organization. Kwai Fun Wong is the Matriach of the Tao Heritage and the claimant's leader. Claimant petitioned for Kwai Fun Wong to receive special immigrant status as a Tao Minister in 1992, 1994 and 1999.

On or about April 29, 1999, the INS revoked claimant's leader's parole. On or about June 17, 1999, the INS detained claimant's leader. On or about June 22, 1999, the INS subjected claimant's leader to expedited removal. This revocation, detention and removal of their leader was improper because her application for adjustment of status was still pending.

The INS used improper means, including, but not limited to, of revocation of parole, detention and removal of claimant's leader which interfered with claimant's existing business relations. In addition, the INS acted with an improper purpose in the revocation of parole, detention and removal of claimant's leader. As a result of INS's actions, claimant has incurred attorney fees and other out-of-pocket expenses.

As a result of INS's intentional actions, claimant's right to practice its religion and its administration has been severely damaged. In addition it has suffered severe damage to its reputation and significant loss of membership and donations.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. CV'01-718

KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID V. BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

May 18, 2001

COMPLAINT
(*Bivens* Claims/Damages; Declaratory Judgment)
DEMAND FOR A JURY TRIAL

I
INTRODUCTION

1. Plaintiff Kwai Fun Wong alleges that the individual defendants, in violation of the First, Fourth, and Fifth Amendments to the United States Constitution, denied her rights as follows: her right to practice her religion; her right to associate with others in the practice of her religion, including members of the Wu-Wei Tien Tao Association; her liberty rights under the governing

immigration law; her right to be free from unreasonable seizures and searches; and her right to substantive and procedural due process of law. Plaintiff Wu-Wei Tien Tao Association and Plaintiff Chong Hua Sheng Mu Gong allege that the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied their rights and the rights of their members to practice their religion and to associate with others in the practice of their religion, including, but not limited to, their right to associate with Plaintiff Kwai Fun Wong. Plaintiffs seek damages on their claims.

Plaintiffs also seek a judgment declaring that the Defendant United States of America and the Immigration and Naturalization Service must rule on Plaintiff Kwai Fun Wong's adjustment of status application under the Immigration and Nationalization Act, Section 245(i).

II
JURISDICTION

2. This court has jurisdiction over plaintiff's claims by virtue of 28 USC §§ 1331 and 2001.

III
PARTIES

3. Plaintiff Kwai Fun Wong ("Ms. Wong"), respectfully called Chin Yee, is the Matriarch of the Tao Heritage and the leader of Wu-Wei Tien Tao Association. She is a citizen of Hong Kong. She first lawfully entered the United States in 1985 as a qualified Tao Minister.

4. Plaintiff Wu-Wei Tien Tao Association (formerly known as "Tien Tao Association, Inc.") is a worldwide, nonprofit religious organization. In the United States,

Plaintiff Wu-Wei Tien Tao Association ("Association") is currently a registered non-profit organization in New York, Texas, and Oregon.

5. Plaintiff Chong Hua Sheng Mu Gong ("Sheng Gong") is a non-profit religious organization located in Houston, Texas and operated by Wu-Wei Tien Tao Association. One of the missions of Sheng Gong is the creation of a holy meeting place for all beings to receive God.

6. At all times material herein, Defendant David V. Beebe ("Beebe"), Jerry F. Garcia ("Garcia"), Jack O'Brien ("O'Brien"), Douglas Glover ("Glover"), and Defendant John Doe INS officials ("John Does") were employees of Defendant United States of America ("USA") and officials of the Immigration and Naturalization Service ("INS"). The complaint will be amended to substitute the true names of any additional, proper defendants now known only as John Does, once their names are learned during discovery.

7. At all times material herein, Beebe was District Director of the Portland, Oregon office of the United States Immigration and Naturalization Service.

8. At all times material herein, Garcia was Assistant District Director of Examinations of the Portland office of the United States Immigration and Naturalization Service.

9. At all times material herein, O'Brien was the Port Director of Portland office of the United States Immigration and Naturalization Service.

10. At all times material herein, Glover was a Supervisory Inspections Officer with the Portland office of the United States Immigration and Naturalization Service.

IV
FACTS

11. The function of Tien Tao is both religious and educational. It is dedicated to the operation of the Association and the fostering of universal truth. The followers believe that Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return heaven by restoring the original nature. One of the most important missions of Tao is to propagate the truth of the immortal Tao throughout the world in order to enlighten people to their true selves and awaken their conscience so that all people can live in harmony, exercise virtue, and restore their connection with God.

12. In 1992, the former Leader of the Association, Fat Fan Cheung, respectfully called Qian Ren, instructed Ms. Wong to accompany him to apply for permanent residency in the United States in order to accomplish the mission of establishing Tao in the west. The Wu-Wei Tien Tao Association filed the initial immigration petition on Ms. Wong's behalf in 1992. The INS approved Ms. Wong's filing in November, 1992 and again in December of 1994. Ms. Wong resided in the United States carrying out her religious work while her petitions were pending before the INS for over six years. Ms. Wong never received notice whether her applications had been ruled upon.

13. On March 16, 1999, Qian Ren, passed away in Houston, Texas. In 1993, Qian Ren had appointed Ms. Wong as the inheritor of the ancient Tao Heritage. Upon Qian Ren's death, Ms. Wong became his successor in the ancient Tao Heritage and was obliged to arrange his funeral services and accompany Qian Ren's body back to

Hong Kong for burial. In the Tao Way, it was crucial for Ms. Wong to accompany Qian Ren's body back to Hong Kong. Ms. Wong was responsible for meeting with all of the senior Tao ministers from the worldwide Tao arena in Hong Kong to plan the future operations of the Association in the aftermath of Qian Ren's sudden death. Ms. Wong, as the inheritor of Qian Ren and the leader of the Association, was the only person qualified and in the position to handle the funerary services of Qian Ren and the one in charge of directing the future of the worldwide organization. Under the circumstances, Ms. Wong was compelled to leave the country to fulfill her religious obligations.

14. Because her petition for permanent residency was pending, Ms. Wong was not permitted to leave the United States without advance permission (advance parole) from the INS. Ms. Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advanced parole, but was unsuccessful. Because of the state of extreme urgency and under the heavy burden of her religious obligations, Ms. Wong departed the United States on or about March 27, 1999, having not been able to obtain advance parole authorization prior to her departure.

15. On April 13, 1999, eighteen days after Ms. Wong left the United States, she returned to the United States via San Francisco. When the INS officers in San Francisco airport were informed of the reason for Ms. Wong's departure without receiving advanced parole and her prior application for permanent residency, they paroled Ms. Wong into the United States and requested that she

report for a deferred inspection in Portland, Oregon on April 28, 1999.

16. On or about April 20, 1999, Ms. Wong and the Association together filed an adjustment of status application under the Immigration and Naturalization Act ("INA"), Section 245(i), which was accepted by the INS's Nebraska Service Center.

17. On or about April 26, 1999, Ms. Wong's immigration attorney notified the Portland, Oregon office of the INS that Ms. Wong had filed her adjustment of status application and notified O'Brien to contact his office if O'Brien wanted to meet with Ms. Wong in person. No one at the INS requested such a meeting, nor did they contact Ms. Wong's attorney.

18. On or about April 29, 1999, Beebe improperly revoked Ms. Wong's parole status. This revocation of parole was improper because her adjustment of status application had not yet been decided.

19. On or about May 20, 1999, Glover and O'Brien erroneously issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility. In doing so, the Portland office of the INS and the individual defendants ignored the filing of the adjustment of status application and failed to consider her application under the INA, Section 245(i), thereby violating her constitutionally guaranteed due process rights.

20. On or about June 9, 1999, Beebe issued a letter requesting Ms. Wong to appear at the INS's Portland office to receive her Employment Authorization Card on June 17, 1999.

21. Ms. Wong appeared on June 17, 1999 to receive her Employment Authorization Card and was seized by INS officers. Ms. Wong was locked in a room by four INS officers and subjected to an inquisition. Ms. Wong was given a letter denying her application for the adjustment of status signed by Garcia for Beebe. After the inquisition, Ms. Wong was arrested, handcuffed and placed in detention. She was then taken to the Multnomah County Detention Center where she was subjected to a strip search, including an orifice search, on two separate occasions. Ms. Wong was imprisoned for a total of five days.

22. Ms. Wong has made a lifetime vow of vegetarianism. Requests were made for vegetarian meals for Ms. Wong, but these requests were ignored. Appropriate food was not provided to accommodate her vegetarian diet, thereby requiring her to live on bread and water during her five-day detention and interfering with the practice of her faith. In addition, while Ms. Wong was incarcerated, she was not provided with a translator or information about her rights or how to contact her attorney or her followers.

23. After her arrest, Ms. Wong was not provided with a hearing before an administrative law judge, despite repeated requests by her immigration attorney, violating the INA and her constitutionally guaranteed due process rights.

24. On or about June 22, 1999, Ms. Wong was removed from the United States under protest and extreme duress, violating the INA and her constitutionally guaranteed due process rights. That same day, she was

served with the Notice and Order of Expedited Removal, described above.

25. Under the INA, Ms. Wong was entitled to a hearing regarding her inadmissibility and a review of her eligibility for adjustment of status based upon the section of the INA under which she applied. In denying her a hearing, one or more of the individual defendants violated the INA and denied her constitutionally guaranteed due process rights.

26. Ms. Wong is the selected Matriarch of the Tao Heritage Ms. Wong is the heavenly mandated successor to continue the unbroken lineage of the ancient Tao Heritage. She is irreplaceable. Ms. Wong, as the leader of the Association, has being denied her right to be in the United States to perform her duties which are essential to the proper functioning of the Association and Sheng Gong, which has had serious consequences for the Association and Sheng Gong. This situation has bred confusion and chaos among Tao practitioners in regions throughout the world. Also, as a result of the individual defendants' conduct, Ms. Wong's standing as the Leader of the Association and Sheng Gong has suffered substantial harm and her mandated mission is now being challenged. The mission of Tao and the administration of the Association and Sheng Gong have been seriously jeopardized.

27. The faith of the members of the Association has also been shaken by Ms. Wong's unlawful arrest, detention and removal. As a result, significant damage to Ms. Wong's reputation, the reputation of the Association and the reputation of Sheng Gong has occurred. Ms. Wong's sacred life was completely obstructed. She was treated

like a criminal by the individual defendants. Their treatment of Ms. Wong is an insult to her human dignity and to all members of the Association and Sheng Gong. By virtue of its action, the individual defendants forced a holy Tao minister who committed herself to a lifetime purity vow of celibacy to strip for body searches on two occasions.

28. The Association and Sheng Gong are registered religious groups in the United States and the individual defendants, by virtue of their conduct described herein, have denied the Association, Sheng Gong and its leader their rights to practice their religion and to associate for that purpose under the First and Fifth Amendments to the United States Constitution. This situation has a substantial damaging impact on both the current and the future propagation of the Association's as well as Sheng Gong's religious mission.

29. The Association and Sheng Gong have been severely damaged economically by Ms. Wong's forced absence. There has been a dramatic decrease of donation income as well as membership in the Association and Sheng Gong. The construction of Chong Hua Sheng Mu Gong (God's Home) could not be completed, which is of utmost importance to the members of the Association and Sheng Gong.

30. The Association and Sheng Gong also suffered severe non-economic damages resulting directly from the removal of Ms. Wong from the United States. Ms. Wong's removal made it necessary for the Association to restructure its worldwide operations. Ms. Wong is responsible for the entire Tao arena, including the United States, and must be consulted daily for guidance with

everyday matters. Her removal caused extreme inconvenience to the Tao administration which disrupted the operations of the entire region.

31. Many members throughout the world disassociated themselves with the Association as a direct result of Ms. Wong's unlawful imprisonment and removal. Many members chose not to recognize Ms. Wong as the inheritor of the Tao mandate and the leader of the Association because her reputation was so severely damaged by the actions of the individual defendants against her. This loss of membership as a direct result of Ms. Wong's removal from the United States has caused severe hardship both economically world non-economically to the Association.

32. Some or all of defendants' conduct described above was a result of one or more of the individual defendants' discrimination against plaintiffs because of their religious practices, beliefs, and association.

33. Some or all of defendants' conduct described above was a result of one or more of the individual defendants' discrimination against Ms. Wong because of her race and/or her national origin.

34. As a result of the individual defendants' conduct described above, Ms. Wong was forced to endure severe distress, humiliation and embarrassment.

35. The conduct of Beebe, Garcia, O'Brien and Glover was in reckless disregard of plaintiffs' well-established rights under the INA and the United States Constitution.

V
FIRST CLAIM FOR RELIEF
(Fourth and Fifth Amendments/*Bivens*)

36. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her liberty rights given to her under the INA, her right to be free from unreasonable seizures and searches, and her right to procedural due process of law.

37. Plaintiff Kwai Fun Wong is entitled an award of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial.

38. Plaintiff Kwai Fun Wong is entitled an award of her litigation expenses/costs against one or more of the individual defendants.

VI
SECOND CLAIM FOR RELIEF
(First and Fifth Amendments/*Bivens*)

39. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her right to practice her religion and her right to associate with others in the practice of her religion, including members of the Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong.

40. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiffs Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong right to

practice their religion and their rights to associate with Plaintiff Kwai Fun Wong.

41. Plaintiffs are entitled separate awards of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial.

42. Plaintiffs are entitled an award of their litigation expenses/costs against one or more of the individual defendants.

VII
THIRD CLAIM FOR RELIEF
(Declaratory Judgment)

43. The INS did not rule on Plaintiff Kwai Fun Wong's adjustment of status application under the INA, Section 245(i).

44. Plaintiff Kwai Fun Wong is entitled to have her application for adjustment of status ruled upon under the INA, Section 245(i).

45. There is a live case and controversy between Plaintiff Kwai Fun Wong and the Defendant USA resulting in the need to have this court issue a judgment declaring that the INS must rule on her application for adjustment of status under the INA, Section 245(i).

46. Plaintiff Kwai Fun Wong is entitled an award of her attorney fees and litigation expenses against the Defendant USA under the Equal Access to Justice Act, 28 U.S.C. § 2412.

WHEREFORE, plaintiffs pray for relief from the Court as follows:

1. Assume jurisdiction in this matter over their claims;

2. Award plaintiffs economic, non-economic and punitive damages against one or more of the individual defendants in separate amounts to be determined at trial;

3. Issue a judgment declaring that the INS must rule on Plaintiff Kwai Fun Wong's application for adjustment of states under the INA, Section 245(i).

4. Award plaintiffs their litigation costs/expenses and attorney fees against one or more of the defendants consistent with the claims above; and

5. Grant such other relief as may be just and proper.

DATED this 18th day of May 2001.

/s/ TOM STEENSON
TOM STEENSON
Of Attorneys for Plaintiffs

/s/ BETH CREIGHTON
BETH CREIGHTON
Of Attorneys for Plaintiffs

PLAINTIFFS HEREBY DEMAND A JURY TRIAL.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID V. BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

Oct. 16, 2001

FIRST AMENDED COMPLAINT
(*Bivens*/RFRA—Damage Claims; Declaratory Judgment)
DEMAND FOR A JURY TRIAL

I
INTRODUCTION

1. Plaintiff Kwai Fun Wong alleges that the individual defendants, in violation of the First, Fourth, and Fifth Amendments to the United States Constitution, denied her rights as follows: her right to practice her religion; her right to associate with others in the practice of her religion, including members of the Wu-Wei Tien Tao As-

sociation; her liberty rights under the governing immigration law; her right to be free from unreasonable seizures and searches; and her right to substantive and procedural due process of law. Plaintiff Wu-Wei Tien Tao Association and Plaintiff Chong Hua Sheng Mu Gong allege that the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied their rights and the rights of their members to practice their religion and to associate with others in the practice of their religion, including, but not limited to, their right to associate with Plaintiff Kwai Fun Wong. Plaintiffs also allege a violation by all defendants of their rights protected by the Religious Freedom Restoration Act, 42 USC § 2000bb. Plaintiffs seek damages on their claims.

Plaintiffs also seek a judgment declaring that the Defendant United States of America and the Immigration and Naturalization Service must rule on Plaintiff Kwai Fun Wong's adjustment of status application under the Immigration and Nationalization Act, Section 245(i).

II
JURISDICTION

2. This court has jurisdiction over plaintiffs' claims by virtue of 28 USC §§ 1331 and 2201.

III
PARTIES

3. Plaintiff Kwai Fun Wong ("Ms. Wong"), respectfully called Chin Yee, is the Matriarch of the Tao Heritage and the leader of Wu-Wei Tien Tao Association. She is a citizen of Hong Kong. She first lawfully entered the United States in 1985 as a qualified Tao Minister.

4. Plaintiff Wu-Wei Tien Tao Association (formerly known as "Tien Tao Association, Inc.") is a worldwide, nonprofit religious organization. In the United States, Plaintiff Wu-Wei Tien Tao Association ("Association") is currently a registered non-profit organization in New York, Texas, and Oregon.

5. Plaintiff Chong Hua Sheng Mu Gong ("Sheng Gong") is a non-profit religious organization located in Houston, Texas and operated by Wu-Wei Tien Tao Association. One of the missions of Sheng Gong is the creation of a holy meeting place for all beings to receive God.

6. At all times material herein, Defendant David V. Beebe ("Beebe"), Jerry F. Garcia ("Garcia"), Jack O'Brien ("O'Brien"), Douglas Glover ("Glover"), and Defendant John Doe INS officials ("John Does") were employees of Defendant United States of America ("USA") and officials of the Immigration and Naturalization Service ("INS"). The complaint will be amended to substitute the true names of any additional, proper defendants now known only as John Does, once their names are learned during discovery.

7. At all times material herein, Beebe was District Director of the Portland, Oregon office of the United States Immigration and Naturalization Service.

8. At all times material herein, Garcia \vas Assistant District Director of Examinations of the Portland office of the United States Immigration and Naturalization Service.

9. At all times material herein, O'Brien was the Port Director of Portland office of the United States Immigration and Naturalization Service.

10. At all times material herein, Glover was a Supervisory Inspections Officer with the Portland office of the United States Immigration and Naturalization Service.

IV
FACTS

11. The function of Tien Tao is both religious and educational. It is dedicated to the operation of the Association and the fostering of universal truth. The followers believe that Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return heaven by restoring the original nature. One of the most important missions of Tao is to propagate the truth of the immortal Tao throughout the world in order to enlighten people to their true selves and awaken their conscience so that all people can live in harmony, exercise virtue, and restore their connection with God.

12. In 1992, the former Leader of the Association, Fat Fan Cheung, respectfully called Qian Ren, instructed Ms. Wong to accompany him to apply for permanent residency in the United States in order to accomplish the mission of establishing Tao in the west. The Wu-Wei Tien Tao Association filed the initial immigration petition on Ms. Wong's behalf in 1992. The INS approved Ms. Wong's filing in November, 1992 and again in December of 1994. Ms. Wong resided in the United States carrying out her religious work while her petitions were pending before the INS for over six years. Ms. Wong never received notice whether her applications had been ruled upon.

13. On March 16, 1999, Qian Ren, passed away in Houston, Texas. In 1993, Qian Ren had appointed Ms.

Wong as the inheritor of the ancient Tao Heritage. Upon Qian Ren's death, Ms. Wong became his successor in the ancient Tao Heritage and was obliged to arrange his funeral services and accompany Qian Ren's body back to Hong Kong for burial. In the Tao Way, it was crucial for Ms. Wong to accompany Qian Ren's body back to Hong Kong. Ms. Wong was responsible for meeting with all of the senior Tao ministers from the worldwide Tao arena in Hong Kong to plan the future operations of the Association in the aftermath of Qian Ren's sudden death. Ms. Wong, as the inheritor of Qian Ren and the leader of the Association, was the only person qualified and in the position to handle the funerary services of Qian Ren and the one in charge of directing the future of the worldwide organization. Under the circumstances, Ms. Wong was compelled to leave the country to fulfill her religious obligations.

14. Because her petition for permanent residency was pending, Ms. Wong was not permitted to leave the United States without advance permission (advance parole) from the INS Ms. Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advanced parole, but was unsuccessful. Because of the state of extreme urgency and under the heavy burden of her religious obligations, Ms. Wong departed the United States on or about March 27, 1999, having not been able to obtain advance parole authorization prior to her departure.

15. On April 13, 1999, eighteen days after Ms. Wong left the United States, she returned to the United States via San Francisco. When the INS officers in San Fran-

cisco airport were informed of the reason for Ms. Wong's departure without receiving advanced parole and her prior application for permanent residency, they paroled Ms. Wong into the United States and requested that she report for a deferred inspection in Portland, Oregon on April 28, 1999.

16. On or about April 20, 1999, Ms. Wong and the Association together filed an adjustment of status application under the Immigration and Naturalization Act ("INA"), Section 245(i), which was accepted by the INS's Nebraska Service Center.

17. On or about April 26, 1999, Ms. Wong's immigration attorney notified the Portland, Oregon office of the INS that Ms. Wong had filed her adjustment of status application and notified O'Brien to contact his office if O'Brien wanted to meet with Ms. Wong in person. No one at the INS requested such a meeting, nor did they contact Ms. Wong's attorney.

18. On or about April 29, 1999, Beebe improperly revoked Ms. Wong's parole status. This revocation of parole was improper because her adjustment of status application had not yet been decided.

19. On or about May 20, 1999, Glover and O'Brien erroneously issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility. In doing so, the Portland office of the INS and the individual defendants ignored the filing of the adjustment of status application and failed to consider her application under the INA, Section 245(i), thereby violating her constitutionally guaranteed due process rights.

20. On or about June 9, 1999, Beebe issued a letter requesting Ms. Wong to appear at the INS's Portland office to receive her Employment Authorization Card on June 17, 1999.

21. Ms. Wong appeared on June 17, 1999 to receive her Employment Authorization Card and was seized by INS officers. Ms. Wong was locked in a room by four INS officers and subjected to an inquisition. Ms. Wong was given a letter denying her application for the adjustment of status signed by Garcia for Beebe. After the inquisition, Ms. Wong was arrested, handcuffed and placed in detention. She was then taken to the Multnomah County Detention Center where she was subjected to a strip search, including an orifice search, on two separate occasions. Ms. Wong was imprisoned for a total of five days.

22. Ms. Wong has made a lifetime vow of vegetarianism. Requests were made for vegetarian meals for Ms. Wong, but these requests were ignored. Appropriate food was not provided to accommodate her vegetarian diet, thereby requiring her to live on bread and water during her five-day detention and interfering with the practice of her faith. , In addition, while Ms. Wong was incarcerated, she was not provided with a translator or information about her rights or how to contact her attorney or her followers.

23. After her arrest, Ms. Wong was not provided with a hearing before an administrative law judge, despite repeated requests by her immigration attorney, violating the INA and her constitutionally guaranteed due process rights.

24. On or about June 22, 1999, Ms. Wong was removed from the United States under protest and extreme duress, violating the INA and her constitutionally guaranteed due process rights. That same day, she was served with the Notice and Order of Expedited Removal, described above.

25. Under the INA, Ms. Wong was entitled to a hearing regarding her inadmissibility and a review of her eligibility for adjustment of status based upon the section of the INA under which she applied. In denying her a hearing, one or more of the individual defendants violated the INA and denied her constitutionally guaranteed due process rights.

26. Ms. Wong is the selected Matriarch of the Tao Heritage Ms. Wong is the heavenly mandated successor to continue the unbroken lineage of the ancient Tao Heritage. She is irreplaceable. Ms. Wong, as the leader of the Association, has being denied her right to be in the United States to perform her duties which are essential to the proper functioning of the Association and Sheng Gong, which has had serious consequences for the Association and Sheng Gong. This situation has bred confusion and chaos among Tao practitioners in regions throughout the world. Also, as a result of the individual defendants' conduct, Ms. Wong's standing as the Leader of the Associations and Sheng Gong has suffered substantial harm and her mandated mission is now being challenged. The mission of Tao and the administration of the Association and Sheng Gong have been seriously jeopardized.

27. The faith of the members of the Association has also been shaken by Ms. Wong's unlawful arrest, deten-

tion and removal. As a result, significant damage to Ms. Wong's reputation, the reputation of the Association and the reputation of Sheng Gong has occurred. Ms. Wong's sacred life was completely obstructed. She was treated like a criminal by the individual defendants. Their treatment of Ms. Wong is an insult to her human dignity and to all members of the Association and Sheng Gong. By virtue of its action, the individual defendants forced a holy Tao Minister who committed herself to a lifetime purity vow of celibacy to strip for body searches on two occasions.

28. The Association and Sheng Gong are registered religious groups in the United States and the individual defendants, by virtue of their conduct described herein, have denied the Association, Sheng Gong and its leader their rights to practice their religion and to associate for that purpose under the First and Fifth Amendments to the United States Constitution. This situation has a substantial damaging impact on both the current and future propagation of the Association's as well as Sheng Gong's religious mission.

29. The Association and Sheng Gong have been severely damaged economically by Ms. Wong's forced absence. There has been a dramatic decrease of donation income as well as membership in the Association and Sheng Gong. The construction of Chong Hua Sheng Mu Gong (God's Home) could not be completed, which is of utmost importance to the members of the Association and Sheng Gong.

30. The Association and Sheng Gong also suffered severe non-economic damages resulting directly from the removal of Ms. Wong from the United States. Ms.

Wong's removal made it necessary for the Association to restructure its worldwide operations. Ms. Wong is responsible for the entire Tao arena, including the United States, and must be consulted daily for guidance with everyday matters. Her removal caused extreme inconvenience to the Tao administration which disrupted the operations of the entire region.

31. Many members throughout the world disassociated themselves with the Association as a direct result of Ms. Wong's unlawful imprisonment and removal. Many members chose not to recognize Ms. Wong as the inheritor of the Tao mandate and the leader of the Association because her reputation was so severely damaged by the actions of the individual defendants against her. The loss of membership as a direct result of Ms. Wong's removal from the United States has caused severe hardship both economically and non-economically to the Association.

32. Some of all of defendants' conduct described above was a result of one or more of the individual defendants' discrimination against plaintiffs because of their religious practices, beliefs, and association.

33. Some or all of defendants' conduct described above was a result of one or more of the individual defendants' discrimination against Ms. Wong because of her race and/or her national origin.

34. As a result of the individual defendants' conduct described above, Ms. Wong was forced to endure severe distress, humiliation and embarrassment.

35. The conduct of Beebe, Garcia, O'Brien and Glover was in reckless disregard of plaintiffs' well-established rights under the INA and the United States Constitution.

V

FIRST CLAIM FOR RELIEF

(Fourth and Fifth Amendments/*Bivens*)

36. One or more of the individual defendants, in violation of the Fourth and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her liberty rights given to her under the INA, her right to be free from unreasonable seizures and searches, and her right to procedural due process of law.

37. Plaintiff Kwai Fun Wong is entitled an award of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial.

38. Plaintiff Kwai Fun Wong is entitled an award of her litigation expenses/costs against one or more of the individual defendants.

VI

SECOND CLAIM FOR RELIEF

(First and Fifth Amendments/*Bivens*)

39. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her right to practice her religion and her right to associate with others in the practice of her religion, including members of the Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong.

40. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiffs Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong their rights to practice their religion and their rights to associate with Plaintiff Kwai Fun Wong.

41. Plaintiffs are entitled separate awards of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial.

42. Plaintiffs are entitled an award of their litigation expenses/costs against one or more of the individual defendants.

VII
THIRD CLAIM FOR RELIEF
(Declaratory Judgment)

43. The INS did not rule on Plaintiff Kwai Fun Wong's adjustment of status application under the INA, Section 245(i).

44. Plaintiff Kwai Fun Wong is entitled to have her application for adjustment of status ruled upon under the INA, Section 245(i).

45. There is a live case and controversy between Kwai Fun Wong and Wu-Wie Tien Tao Association and the United States resulting in the need to have this court issue a judgment against the United States declaring that the INS must rule on her application for adjustment of status under the INA, Section 245(i).

46. Plaintiff Kwai Fun Wong and Plaintiff Wu-Wie Tien Tao Association are entitled an award of their at-

torney fees and litigation expenses against the Defendant United States under the Equal Access to Justice Act, 28 U.S.C. § 2412.

VIII
FOURTH CLAIM FOR RELIEF
(Religious Freedom Restoration Act)

47. Defendants conduct described herein substantially burdened plaintiffs' exercise of religion in violation of the Religious Freedom Restoration Act, 42 USC § 2000bb.

48. Plaintiffs are entitled separate awards of economic, non-economic and punitive damages against one or more of the defendants in amounts to be determined at trial.

49. Plaintiffs are entitled an award of their litigation expenses/costs against one or more of the defendants.

WHEREFORE, plaintiffs pray for relief from the Court as follows:

1. Assume jurisdiction in this matter over their claims;

2. Award plaintiffs economic, non-economic and punitive damages against the defendants, consistent with plaintiffs' claims as set forth above, in separate amounts to be determined at trial;

3. Issue a judgment against the United States declaring that the INS must rule on Plaintiff Kwai Fun Wong's application for adjustment of states under the INA, Section 245(i).

4. Award plaintiffs their litigation costs/expenses and attorney fees against one or more of the defendants consistent with the claims above; and

5. Grant such other relief as may be just and proper.

DATED this 16th day of Oct. 2001.

/s/ TOM STEENSON
TOM STEENSON
Of Attorneys for Plaintiffs

/s/ BETH CREIGHTON\
BETH CREIGHTON
Of Attorneys for Plaintiffs

PLAINTIFFS HEREBY DEMAND A JURY TRIAL.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOES INS OFFICIALS AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Nov. 9, 2001]

MOTION TO ALLOW FILING OF SECOND AMENDED COMPLAINT

DECLARATION OF COUNSEL

MOTION:

Plaintiffs have attempted to confer with defendants on this motion. However, defense counsel has not responded to counsel for plaintiffs' two requests for a response. Based upon other positions taken by defendants in this case, plaintiffs anticipate the motion will be opposed.

Plaintiffs move for an order allowing the filing of plaintiff's Second Amended Complaint on or after November 20, 2001.

This motion is supported by the Declaration of Counsel which follows the record and herein.

Dated this 8th day of November 2001.

/s/ TOM STEENSON
TOM STEENSON
Of Attorneys for Plaintiffs

DECLARATION OF COUNSEL:

I, Tom Steenson, declare as follows:

1. I am one of plaintiffs' attorneys.

2. On or about May 18, 2001, plaintiffs filed administrative under the Federal Torts Claim Act ("FTCA"). The administrative exhaustion requirements for those claims will be satisfied on or before November 19, 2001.

3. Attached hereto as Exhibit A is a copy of plaintiffs' proposed Second Amended Complaint which includes plaintiffs' FTCA claims. The claims arise out of the same facts and circumstances giving rise to plaintiffs' current claims.

4. Plaintiffs anticipate defendants will oppose this motion.

Dated this 8th day of Nov. 2001.

/s/ TOM STEENSON
TOM STEENSON
Of Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID V. BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Nov. 9, 2001]

[PROPOSED] SECOND AMENDED COMPLAINT
(*Bivens*/RFRA/FTCA—Damage Claims/ Declaratory Judgment)

DEMAND FOR A JURY TRIAL

I
INTRODUCTION

1. Plaintiff Kwai Fun Wong alleges that the individual defendants, in violation of the First, Fourth, and Fifth Amendments to the United States Constitution, denied her rights as follows: her right to practice her religion; her right to associate with others in the practice of her religion, including members of the Wu-Wei Tien Tao Association; her liberty rights under the governing im-

migration law; her right to be free from unreasonable seizures and searches; and her right to substantive and procedural due process of law. Plaintiff Wu-Wei Tien Tao Association and Plaintiff Chong Hua Sheng Mu Gong allege that the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied their rights and the rights of their members to practice their religion and to associate with others in the practice of their religion, including, but not limited to, their right to associate with Plaintiff Kwai Fun Wong. Plaintiffs also allege a violation by all defendants of their rights protected by the Religious Freedom Restoration Act, 42 USC § 2000bb-1. Plaintiffs seek damages on their claims.

Plaintiffs also seek a judgment declaring that the Defendant United States of America and the Immigration and Naturalization Service must rule on Plaintiff Kwai Fun Wong's adjustment of status application under the Immigration and Nationalization Act, Section 245(I).

Plaintiffs also allege claims for damages under the Federal Torts Claim Act.

II
JURISDICTION

2. This court has jurisdiction over plaintiffs' claims by virtue of 28 USC §§ 1331, 1346(b), and 2201.

III
PARTIES

3. Plaintiff Kwai Fun Wong ("Ms. Wong"), respectfully called Chin Yee, is the Matriarch of the Tao Heritage and the leader of Wu-Wei Tien Tao Association. She

is a citizen of Hong Kong. She first lawfully entered the United States in 1985 as a qualified Tao Minister.

4. Plaintiff Wu-Wei Tien Tao Association (formerly known as "Tien Tao Association, Inc.") is a worldwide, nonprofit religious organization. In the United States, Plaintiff Wu-Wei Tien Tao Association ("Association") is currently a registered non-profit organization in New York, Texas, and Oregon.

5. Plaintiff Chong Hua Sheng Mu Gong ("Sheng Gong") is a non-profit religious organization located in Houston, Texas and operated by Wu-Wei Tien Tao Association. One of the missions of Sheng Gong is the creation of a holy meeting place for all beings to receive God.

6. At all times material herein, Defendant David V. Beebe ("Beebe"), Jerry F. Garcia ("Garcia"), Jack O'Brien ("O'Brien"), Douglas Glover ("Glover"), and Defendant John Doe INS officials ("John Does") were employees of Defendant United States of America ("USA") and officials of the Immigration and Naturalization Service ("INS"). The complaint will be amended to substitute the true names of any additional, proper defendants now known only as John Does, once their names are learned during discovery.

7. At all times material herein, Beebe was District Director of the Portland, Oregon office of the United States Immigration and Naturalization Service.

8. At all times material herein, Garcia was Assistant District Director of Examinations of the Portland office of the United States Immigration and Naturalization Service.

9. At all times material herein, O'Brien was the Port Director of Portland office of the United States Immigration and Naturalization Service.

10. At all times material herein, Glover was a Supervisory Inspections Officer with the Portland office of the United States Immigration and Naturalization Service.

IV
FACTS

11. The function of Tien Tao is both religious and educational. It is dedicated to the operation of the Association and the fostering of universal truth. The followers believe that Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return heaven by restoring the original nature. One of the most important missions of Tao is to propagate the truth of the immortal Tao throughout the world in order to enlighten people to their true selves and awaken their conscience so that all people can live in harmony, exercise virtue, and restore their connection with God.

12. In 1992, the former Leader of the Association, Fat Fan Cheung, respectfully called Qian Ren, instructed Ms. Wong to accompany him to apply for permanent residency in the United States in order to accomplish the mission of establishing Tao in the west. The Wu-Wei Tien Tao Association filed the initial immigration petition on Ms. Wong's behalf in 1992. The INS approved Ms. Wong's filing in November, 1992 and again in December of 1994. Ms. Wong resided in the United States carrying out her religious work while her petitions were pending before the INS for over six years. Ms. Wong never

received notice whether her applications had been ruled upon.

13. On March 16, 1999, Qian Ren, passed away in Houston, Texas. In 1993, Qian Ren had appointed Ms. Wong as the inheritor of the ancient Tao Heritage. Upon Qian Ren's death, Ms. Wong became his successor in the ancient Tao Heritage and was obliged to arrange his funeral services and accompany Qian Ren's body back to Hong Kong for burial. In the Tao Way, it was crucial for Ms. Wong to accompany Qian Ren's body back to Hong Kong. Ms. Wong was responsible for meeting with all of the senior Tao ministers from the worldwide Tao arena in Hong Kong to plan the future operations of the Association in the aftermath of Qian Ren' s sudden death. Ms. Wong, as the inheritor of Qian Ren and the leader of the Association, was the only person qualified and in the position to handle the funerary services of Qian Ren and the one in charge of directing the future of the worldwide organization. Under the circumstances, Ms. Wong was compelled to leave the country to fulfill her religious obligations.

14. Because her petition for permanent residency was pending, Ms. Wong was not permitted to leave the United States without advance permission (advance parole) from the INS. Ms. Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advanced parole, but was unsuccessful. Because of the state of extreme urgency and under the heavy burden of her religious obligations, Ms. Wong departed the United States on or about March 27, 1999, having not been able

to obtain advance parole authorization prior to her departure.

15. On April 13, 1999, eighteen days after Ms. Wong left the United States, she returned to the United States via San Francisco. When the INS officers in San Francisco airport were informed of the reason for Ms. Wong's departure without receiving advanced parole and her prior application for permanent residency, they paroled Ms. Wong into the United States and requested that she report for a deferred inspection in Portland, Oregon on April 28, 1999.

16. On or about April 20, 1999, Ms. Wong and the Association together filed an adjustment of status application under the Immigration and Naturalization Act ("INA"), Section 245(i), which was accepted by the INS's Nebraska Service Center.

17. On or about April 26, 1999, Ms. Wong's immigration attorney notified the Portland, Oregon office of the INS that Ms. Wong had filed her adjustment of status application and notified O'Brien to contact his office if O'Brien wanted to meet with Ms. Wong in person. No one at the INS requested such a meeting, nor did they contact Ms. Wong's attorney.

18. On or about April 29, 1999, Beebe improperly revoked Ms. Wong's parole status. This revocation of parole was improper because her adjustment of status application had not yet been decided.

19. On or about May 20, 1999, Glover and O'Brien erroneously issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility. In doing so, the Portland office of the INS and the individual de-

fendants ignored the filing of the adjustment of status application and failed to consider her application under the INA, Section 245(i), thereby violating her constitutionally guaranteed due process rights.

20. On or about June 9, 1999, Beebe issued a letter requesting Ms. Wong to appear at the INS's Portland office to receive her Employment Authorization Card on June 17, 1999.

21. Ms. Wong appeared on June 17, 1999 to receive her Employment Authorization Card and was seized by INS officers. Ms. Wong was locked in a room by four INS officers and subjected to an inquisition. Ms. Wong was given a letter denying her application for the adjustment of status signed by Garcia for Beebe. After the inquisition, Ms. Wong was arrested, handcuffed and placed in detention. She was then taken to the Multnomah County Detention Center where she was subjected to a strip search, including an orifice search, on two separate occasions. Ms. Wong was imprisoned for a total of five days.

22. Ms. Wong has made a lifetime vow of vegetarianism. Requests were made for vegetarian meals for Ms. Wong, but these requests were ignored. Appropriate food was not provided to accommodate her vegetarian diet, thereby requiring her to live on bread and water during her five-day detention and interfering with the practice of her faith. In addition, while Ms. Wong was incarcerated, she was not provided with a translator or information about her rights or how to contact her attorney or her followers.

23. After her arrest, Ms. Wong was not provided with a hearing before an administrative law judge, despite repeated requests by her immigration attorney, violating the INA and her constitutionally guaranteed due process rights.

24. On or about June 22, 1999, Ms. Wong was removed from the United States under protest and extreme duress, violating the INA and her constitutionally guaranteed due process rights. That same day, she was served with the Notice and Order of Expedited Removal, described above.

25. Under the INA, Ms. Wong was entitled to a hearing regarding her inadmissibility and a review of her eligibility for adjustment of status based upon the section of the INA under which she applied. In denying her a hearing, one or more of the individual defendants violated the INA and denied her constitutionally guaranteed due process rights.

26. Ms. Wong is the selected Matriarch of the Tao Heritage Ms. Wong is the heavenly mandated successor to continue the unbroken lineage of the ancient Tao Heritage. She is irreplaceable. Ms. Wong, as the leader of the Association, has being denied her right to be in the United States to perform her duties which are essential to the proper functioning of the Association and Sheng Gong, which has had serious consequences for the Association and Sheng Gong. This situation has bred confusion and chaos among Tao practitioners in regions throughout the world. Also, as a result of the individual defendants' conduct, Ms. Wong's standing as the Leader of the Association and Sheng Gong has suffered substantial harm and her mandated mission is now being chal-

lenged. The mission of Tao and the administration of the Association and Sheng Gong have been seriously jeopardized.

27. The faith of the members of the Association has also been shaken by Ms. Wong's unlawful arrest, detention and removal. As a result, significant damage to Ms. Wong's reputation, the reputation of the Association and the reputation of Sheng Gong has occurred. Ms. Wong's sacred life was completely obstructed. She was treated like a criminal by the individual defendants. Their treatment of Ms. Wong is an insult to her human dignity and to all members of the Association and Sheng Gong. By virtue of its action, the individual defendants forced a holy Tao Minister who committed herself to a lifetime purity vow of celibacy to strip for body searches on two occasions.

28. The Association and Sheng Gong are registered religious groups in the United States and the individual defendants, by virtue of their conduct described herein, have denied the Association, Sheng Gong and its leader their rights to practice their religion and to associate for that purpose under the First and Fifth Amendments to the United States Constitution. This situation has a substantial damaging impact on both the current and the future propagation of the Association's as well as Sheng Gong's religious mission.

29. The Association and Sheng Gong have been severely damaged economically by Ms. Wong's forced absence. There has been a dramatic decrease of donation income as well as membership in the Association and Sheng Gong. The construction of Chong Hua Sheng Mu Gong (God's Home) could not be completed, which is of

utmost importance to the members of the Association and Sheng Gong.

30. The Association and Sheng Gong also suffered severe non-economic damages resulting directly from the removal of Ms. Wong from the United States. Ms. Wong's removal made it necessary for the Association to restructure its worldwide operations. Ms. Wong is responsible for the entire Tao arena, including the United States, and must be consulted daily for guidance with everyday matters. Her removal caused extreme inconvenience to the Tao administration which disrupted the operations of the entire region.

31. Many members throughout the world disassociated themselves with the Association as a direct result of Ms. Wong's unlawful imprisonment and removal. Many members chose not to recognize Ms. Wong as the inheritor of the Tao mandate and the leader of the Association because her reputation was so severely damaged by the actions of the individual defendants against her. This loss of membership as a direct result of Ms. Wong's removal from the United States has caused severe hardship both economically and non-economically to the Association.

32. Some or all of defendants' conduct described above was a result of one or more of the individual defendants' discrimination against plaintiffs because of their religious practices, beliefs, and association.

33. Some or all of defendants' conduct described above was a result of one or more of the individual defendants' discrimination against Ms. Wong because of her race and/or her national origin.

34. As a result of the individual defendants' conduct described above, Ms. Wong was forced to endure severe distress, humiliation and embarrassment.

35. The conduct of Beebe, Garcia, O'Brien and Glover was in reckless disregard of plaintiffs' well-established rights under the INA and the United States Constitution.

V

FIRST CLAIM FOR RELIEF

(Fourth and Fifth Amendments/*Bivens*)

36. One or more of the individual defendants, in violation of the Fourth and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her liberty rights given to her under the INA, her right to be free from unreasonable seizures and searches, and her right to procedural due process of law.

37. Plaintiff Kwai Fun Wong is entitled an award of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial.

38. Plaintiff Kwai Fun Wong is entitled an award of her litigation expenses/costs against one or more of the individual defendants.

VI

SECOND CLAIM FOR RELIEF

(First and Fifth Amendments/*Bivens*)

39. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her right to practice her religion and her right to associate with others in the practice of her religion, including mem-

bers of the Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong.

40. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiffs Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong their rights to practice their religion and their rights to associate with Plaintiff Kwai Fun Wong.

41. Plaintiffs are entitled separate awards of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial.

42. Plaintiffs are entitled an award of their litigation expenses/costs against one or more of the individual defendants.

VII
THIRD CLAIM FOR RELIEF
(Declaratory Judgment)

43. The INS did not rule on Plaintiff Kwai Fun Wong.'s adjustment of status application under the INA, Section 245(i).

44. Plaintiff Kwai Fun Wong is entitled to have her application for adjustment of status ruled upon under the INA, Section 245(i).

45. There is a live case and controversy between Kwai Fun Wong and Wu-Wie Tien Tao Association and the United States resulting in the need to have this court issue a judgment against the United States declaring that the INS must rule on her application for adjustment of status under the INA, Section 245(i).

46. Plaintiff Kwai Fun Wong and Plaintiff Wu-Wie Tien Tao Association are entitled an award of their attorney fees and litigation expenses against the Defendant United States under the Equal Access to Justice Act, 28 U.S.C. § 2412.

VIII
FOURTH CLAIM FOR RELIEF
(Religious Freedom Restoration Act)

47. Defendants conduct described herein substantially burdened plaintiffs' exercise of religion in violation of the Religious Freedom Restoration Act, 42 USC § 2000bb-1.

48. Plaintiffs are entitled separate awards of economic, non-economic and punitive damages against one or more of the defendants in amounts to be determined at trial.

49. Plaintiffs are entitled an award of their litigation expenses/costs against one or more of the defendants.

IX
FIFTH CLAIM FOR RELIEF
(Federal Torts Claim Act)

50. The United States is liable under the Federal Torts Claim Act for the torts of false imprisonment, intentional interference with economic relations, and negligence.

51. Plaintiffs are entitled separate awards of economic and non-economic damages against the United States in amounts to be determined at trial.

52. Plaintiffs are entitled an award of their costs against the Untied States.

WHEREFORE, plaintiffs pray for relief from the Court as follows:

1. Assume jurisdiction in this matter over their claims;

2. Award plaintiffs economic, non-economic and punitive damages against the defendants, consistent with plaintiffs' claims as set forth above, in separate amounts to be determined at trial;

3. Issue a judgment against the United States declaring that the INS must rule on Plaintiff Kwai Fun Wong's application for adjustment of states under the INA, Section 245(i).

4. Award plaintiffs their litigation costs/expenses and attorney fees against one or more of the defendants consistent with the claims above; and

5. Grant such other relief as may be just and proper.

DATED this __ day _____2001.

_____
TOM STEENSON
Of Attorneys for Plaintiffs

_____
BETH CREIGHTON
Of Attorneys for Plaintiffs

PLAINTIFFS HEREBY DEMAND A JURY TRIAL.

CERTIFICATE OF SERVICE

I hereby certify that I telefaxed (202 / 616-9366) and mailed a true copy of the foregoing motion to Christine A. Bither, attorney for defendants, addressed to her Washington, D.C., office address on this date.

Dated this 8th day of Nov. 2001.

/s/ TOM STEENSON
TOM STEENSON
Of Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV-01-718-ST

KWAI FUN WONG, WU-WEI TIEN TOA ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS, AND, UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Nov. 30, 2001]

MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS TO ALLOW FILING OF SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiffs, Kwai Fun Wong, Wi-Wei Tien Tao Association, and Chong Hua Sheng Mu Gong, originally commenced this action on May 18, 2001, by filing their Complaint which named the United States of America and several individual employees of the Immigration and Naturalization Service as the parties defendant. In the First and Second Claims for Relief, the original Complaint sought money damages against the individual de-

fendants for alleged violations of Plaintiff's rights under the First, Fourth, and Fifth Amendments to the United States Constitution, and the original Complaint's Third Claim for Relief demanded a declaratory judgment against the United States. On September 26, 2001, defendants moved to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

On October 17, 2001, Plaintiffs filed a First Amended Complaint, which purported to state a claim for money damages against defendants under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Defendants moved to dismiss the First Amended Complaint on October 29, 2001.

On November 13, 2001, Plaintiffs filed a Motion to Allow Filing of Second Amended Complaint. The proposed Second Amended Complaint purports to allege claims for money damages against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). In a declaration annexed to their Motion, Plaintiffs' counsel avers that on or about May 18, 2001 (*i.e.*, the same date on which this action was originally commenced), Plaintiffs filed administrative claims, and then asserts that the administrative exhaustion requirements will be satisfied on or about November 19, 2001.[1] As will be demonstrated below, leave to file the Second

---

[1] Solely for purposes of this opposition to the Motion to Allow Filing of Second Amended Complaint, the United States accepts the truthfulness of the averment of Plaintiffs' counsel that the administrative claims were filed on or about May 18, 2001.

Amended Complaint should be denied because the proposed amendment would be futile.

ARGUMENT

Because they already have amended their Complaint once as a matter of right, Plaintiffs must obtain leave of the Court (or written consent of the adverse party)[2] for any further amendments. *See* Rule 15(a), FED. R. CIV. P. Futility of a proposed amendment, by itself, can justify denying leave to amend under Rule 15(a). *See United States ex rel. Lee v. Smithkline Beecham, Inc.*, 254 F.3d 1048, 1052 (9th Cir. 2001). Here, Plaintiffs' proposed amendment clearly would be futile.

The FTCA is a limited waiver of sovereign immunity which authorizes suit against the United States for certain torts committed by Government employees acting within the scope of their employment. *See* 28 U.S.C. 1346(b)(1).[3] This waiver of immunity is subject to numerous conditions. One such condition is set forth in 28

---

[2] As indicated in Plaintiffs' Motion, the United States has not consented in writing or otherwise to the filing of the proposed Second Amended Complaint.

[3] Section 1346(b)(1) provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

U.S.C. 2675(a),[4] which requires exhaustion of administrative remedies before a suit under the FTCA may be instituted.

Section 2675(a) requires not only that Plaintiffs present their administrative claims to the appropriate Federal agency, but also that Plaintiffs forego instituting an action until the agency finally denies the claims in writing, or six months elapse without final disposition of the claim by the agency. Failure to comply with these requirements is a jurisdictional defect. *See, e.g., McNeil v. United States*, 508 U.S. 106, 112 (1993); *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000); *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir. 1995); *Jerves v. United States*, 966 F.2d 517, 521 (9th Cir. 1992); *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999); *Reynolds v. United States*, 748 F.2d 291, 292 (5th Cir. 1984).

Here, according to the declaration of counsel annexed to the Motion to Allow Filing of the Second Amended Complaint, Plaintiffs' filed their administrative claims on

---

[4] Section 2675(a), which is part of chapter 171 of title 28, United States Code, provides in relevant part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

or about May 18, 2001, the very same date on which they commenced this action by filing their original Complaint. Thus, at the time this action originally was instituted, Plaintiffs had not yet completely exhausted their administrative remedies.

This jurisdictional defect cannot be cured simply by filing an amended complaint once the administrative exhaustion requirements have been satisfied. *See, e.g., Sparrow v. U.S. Postal Service*, 825 F. Supp. 252, 254-55 (E.D. Cal. 1993). As the Tenth Circuit stated in its decision in *Duplan*:

> We agree with the *Sparrow* court's conclusion that, as a general rule, a premature "complaint cannot be cured through amendment, but, instead, plaintiff must file a new suit." *Sparrow*, 825 F. Supp. at 255. Allowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the administrative exhaustion requirement meaningless and impose an unnecessary burden on the judicial system. *See McNeil*, 508 U.S. at 112; *Sparrow*, 825 F. Supp. at 255. "Congress intended to require complete exhaustion * * * before invocation of the judicial process." *McNeil*, 508 U.S. at 112.

Duplan, 188 F.3d at 1199. *Accord, e.g., Reynolds*, 748 F.2d at 293.[5]

---

[5] The Supreme Court subsequently cited the Fifth Circuit's decision in *Reynolds* with approval. *See McNeil*, 508 U.S. at 110 n.6. As noted by the court of appeals in *Reynolds*, under the provision of Rule 15(c), FED. R. CIV. P., an amendment would relate back to the

Thus, the only way for Plaintiffs to properly invoke this Court's jurisdiction under the FTCA is to institute a new action once they have completely exhausted their administrative remedies. *See McNeil*, 508 U.S. at 111-12; *Duplan*, 188 F.3d at 1199; *Reynolds*, 748 F.2d at 293. Amending the complaint does not constitute instituting a new action, and leave to file such an amendment therefore should be denied.

CONCLUSION

For the above-stated reasons, the Court should not allow Plaintiffs to file the Second Amended Complaint in this matter.

Respectfully submitted,

ROBERT D. McCALLUM, Jr.
Assistant Attorney General

MARGARET J. PERRY
Senior Litigation Counsel
Office of Immigration Litigation

/s/ CHRISTINE A. BITHER
CHRISTINE A. BITHER
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044-0878
Telephone: (202) 514-3567

CERTIFICATE OF SERVICE

---

date on which the action was prematurely instituted. *See Reynolds*, 748 F.2d at 293.

I hereby certify that on November 28, 2001, one copy of Defendants' Memorandum in Opposition To Plaintiffs' Motions To Allow Filing Of Second Amended Complaint was served upon Plaintiffs' attorneys, by facsimile and by Federal Express for next day delivery addressed to:

Beth Creighton, Esq.
Tom Steenson, Esq.
STEENSON, SCHUMAN, TEWKSBURY & ROSE, PC
815 SW Second Ave., Suite 500
Portland, OR 97204

/s/ CHRISTINE A. BITHER
CHRISTINE A. BITHER

[SEAL OMITTED] **U.S DEPARTMENT OF JUSTICE**

Immigration and
Naturalization Service

Refer to file nos.
WRCOU 90/1-01.298,
299, 300

December 3, 2001

Office of the Regional Counsel
24000 Avila Road, 6th Floor
Laguna Niguel, CA 92677
POB 30080
Laguna Niguel, CA 92607-0080

Beth Creighton, Esquire
815 SW Second Ave
Ste 500
Portland, OR 97204

Re: Administrative Tort Claims against the Immigration and Naturalization Service

Clients: Chong Hua Sheng Mu Gong, Wu-Wei Tien Tao (Association) and Kwai Fun Wong

Dear Ms. Creighton:

You have filed a civil action in United States District Court against the Immigration and Naturalization Service, United States Government, *et al.*

Section 2675(a) of Title 28, United States Code, states:

> An action shall not be instituted upon a claim against the United States for money damages, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of

> any employee of the Government while acting within the scope of his office or employment unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant, anytime thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

You have exercised your clients' option under § 2675(a) to file suit. Accordingly, the administrative tort claim you presented to the United States Department of Justice, Immigration and Naturalization Service is hereby denied.

I am required by law (28 C.F.R. § 14.9(a)) to inform you that if you are dissatisfied with this determination, you may file suit in an appropriate United States District Court not later than six months after the date of mailing of this notification of denial. 28 U.S.C. § 2401(b).

Very truly yours,

/s/ JULIE L. HECHT
JULIE L. HECHT
Assistant Regional Counsel

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
7000 1670 0012 9329 8746
$
PS Form 3800, May 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOES INS OFFICIALS AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Dec. 10, 2001]

REPLY MEMORANDUM TO DEFENDANTS' OPPOSITION TO MOTION TO ALLOW FILING OF SECOND AMENDED COMPLAINT

A. INTRODUCTION

On November 8, 2001, plaintiffs moved to allow the filing of a Second Amended Complaint to add their Federal Tort Claims Act ("FTCA") claims after the exhaustion of their administrative remedies. By November 19, 2001, it had been 180 days from the time plaintiffs' original administrative claims were filed against the United States, thereby satisfying the jurisdictional requirements of filing claims for money damages under the FTCA against the United States in federal court. On November 13, 2001, plaintiffs amended their motion to allow the filing of a Second Amended Complaint to add a claim for

attorney fees to the Religious Freedom Restoration Act ("RFRA") claim already included in the Amended Complaint. On November 14, 2001, the court granted plaintiffs' original motion. On November 20, 2001, the court set plaintiffs' Amended Motion to Allow Filing of the Second Amended Complaint for oral argument on December 17, 2001. Defendants filed their opposition to plaintiffs' motion on November 28, 2001.[1] For the following reasons, plaintiffs' amended motion be granted.

B. AMENDMENT STANDARD

FRCP 15(a) allows for the filing of amended pleadings upon motion after the filing of a responsive pleading by the opposing party. Leave to amend the pleading should be freely given unless the opposing party makes a showing of undue prejudice, or bad faith or dilatory motive on the part of the moving party. *Forman v. Davis*, 371 US 178, 182 (1962); *Martinez v. Newport Beach City*, 125 F3d 777, 785 (9th Cir 1997). Moreover, amendments seeking to add claims are to be granted more freely than to add other parties. *Union Pac RR Co v. Nevada Power Co*, 950 F2d 1429, 1432 (9th Cir 1991).

C. FEDERAL TORT CLAIMS ACT LAW

"The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1988), waives the sovereign immunity of the United States for actions in tort." *Jerves v. US*, 966 F2d 517, 518 (9th Cir 1992). The federal district courts have

---

[1] Pursuant to Local Rule 7.1(f), defendants had either 11 (or at most 14) days to file their opposition to plaintiff's amended motion. Defendants filed their opposition 15 days after plaintiffs filed their amended motion and 20 days after plaintiffs filed their original motion.

exclusive jurisdiction over FTCA claims which arise from the conduct of government employees working in the scope of their employment. *Id.* Prior to an individual filing an action against the United States in district court, he or she must seek an administrative resolution of her claim. *Id.* 28 U.S.C. § 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

1. Plaintiffs asserted no claim covered by the FTCA in their previous complaints.

In plaintiffs' Amended Complaint, plaintiffs assert claims against employees of the United States (certain INS officials) acting in their *individual* capacities alleging that defendants denied plaintiffs their rights under the United States Constitution. Plaintiffs also asserted a claim for declaratory judgment against the United States and a claim for damages against all defendants for

their violation of the RFRA.[2] None of the claims asserted in plaintiffs' Amended Complaint are claims for "money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2675(a). Therefore, none of the claims asserted in plaintiffs' Amended Complaint are covered under the FTCA. Exhaustion of administrative remedies is not required for those claims. *See Federal Deposit Ins. Corp. v. Meyer*, 114 S. Ct. 996, 1001 (1994)(constitutional claims are not cognizable under the FTCA); *Billings v. United States*, 57 F.3d 797, 800 (9th Cir 1995); 28 USC § 2679(b)(2)(A); *Nurse V. United States of America, et al.*, 226 F.3d 996, 1004 (9th Cir 2000)(FTCA is irrelevant to claims against government employees acting in their individual capacity).

Defendants have cited a multitude of cases supporting their theory that plaintiffs have filed their FTCA claims prematurely and are not allowed to cure through amendment. See Defs' Opp, 4-5. All of the cases cited by defendants are irrelevant to this case because they involve plaintiffs who filed complaints for conduct covered by the FTCA, but failed to file a tort claim notices prior to filing the complaint in federal court or the party that did file the tort claim was not the party that sued or the claimant commenced the civil suit before six months had

---

[2] The RFRA provides its own waiver of sovereign immunity. 42 USC 2000bb-1(c)—"Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

lapsed from the filing of the tort claim. Here, plaintiffs asserted no FTCA claims in their previous complaints and there is no defect "to cure." Plaintiffs merely seek to amend their complaint to add the FTCA claims against the United States now that their administrative remedies have been exhausted.[3]

2. Plaintiffs' administrative remedies have been exhausted.

The claims against the United States that fell under the FTCA administrative exhaustion requirements were filed with the administrative agency on May 18, 2001. This claim was *not* asserted in the federal complaint filed on May 18, 2001, nor in the Amended Complaint filed some months later. Over six months have elapsed since the filing of the administrative tort claims, with no response from the United States on the administrative claims. Pursuant to 28 USC § 2675(a), those claims have been deemed denied and plaintiffs' administrative remedies on those claims have been exhausted. Therefore, the court currently has jurisdiction over plaintiffs' FTCA claims and plaintiffs should be allowed to amend the complaint to add those claims.

---

[3] Plaintiffs also seek to amend to add a claim for attorney fees to their RFRA claim; however, defendants have voiced no objections on this issue.

D. CONCLUSION

For all of the foregoing reasons, plaintiffs should be granted leave to file their Second Amended Complaint.

DATED this 6th day of Dec. 2001.

/s/ BETH CREIGHTON
TOM STEENSON
BETH CREIGHTON
Of Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I telefaxed (202 / 616-9366) and mailed a true copy of the foregoing memorandum to Christine A. Bither, attorney for defendants, addressed to her Washington, D.C., office address on this date.

DATED this 6th day of December 2001.

/s/ BETH CREIGHTON
BETH CREIGHTON
Of Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 01-718-ST

KWAI FUN WONG, WU-WEI TIEN TAO ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID V. BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS, AND UNITED STATES OF AMERICA, DEFENDANTS

Filed: Aug. 13, 2002

SECOND AMENDED COMPLAINT
(*Bivens*/RFRA/FTCA—Damage Claims/Declaratory Judgment)
DEMAND FOR A JURY TRIAL

I
INTRODUCTION

1. Plaintiff Kwai Fun Wong alleges that the individual defendants, in violation of the First, Fourth, and Fifth Amendments to the United States Constitution, denied her rights as follows: her right to practice her religion; her right to associate with others in the practice of her religion, including members of the Wu-Wei Tien

Tao Association; her liberty rights under the governing immigration law; her right to be free from unreasonable seizures and searches; and her right to substantive and procedural due process of law. Plaintiff Wu-Wei Tien Tao Association and Plaintiff Chong Hua Sheng Mu Gong allege that the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied their rights and the rights of their members to practice their religion and to associate with others in the practice of their religion, including, but not limited to, their right to associate with Plaintiff Kwai Fun Wong. Plaintiffs also allege a violation by all defendants of their rights protected by the Religious Freedom Restoration Act, 42 USC § 2000bb-1. Plaintiffs seek damages on those claims. Finally, plaintiffs also allege claims for damages under the Federal Torts Claim Act.

Plaintiffs also seek a judgment declaring that the Defendant United States of America and the Immigration and Naturalization Service must provide Plaintiff Kwai Fun Wong an opportunity to appeal or seek post denial reopening or reconsideration under 8 CFR § 103.5(a).

II
JURISDICTION

2. This court has jurisdiction over plaintiffs' claims by virtue of 28 USC §§ 1331, 1346(b), and 2201.

III
PARTIES

3. Plaintiff Kwai Fun Wong ("Ms. Wong"), respectfully called Chin Yee, is the Matriarch of the Tao Heritage and the leader of Wu-Wei Tien Tao Association. She

is a citizen of Hong Kong. She first lawfully entered the United States in 1985 as a qualified Tao Minister.

4. Plaintiff Wu-Wei Tien Tao Association (formerly known as "Tien Tao Association, Inc.") is a worldwide, nonprofit religious organization. In the United States, Plaintiff Wu-Wei Tien Tao Association ("Association") is currently a registered non-profit organization in New York, Texas, and Oregon.

5. Plaintiff Chong Hua Sheng Mu Gong ("Sheng Gong") is a non-profit religious organization located in Houston, Texas and operated by Wu-Wei Tien Tao Association. One of the missions of Sheng Gong is the creation of a holy meeting place for all beings to receive God.

6. At all times material herein, Defendant David V. Beebe ("Beebe"), Jerry F. Garcia ("Garcia"), Jack O'Brien ("O'Brien"), Douglas Glover ("Glover"), and Defendant John Doe INS officials ("John Does") were employees of Defendant United States of America ("USA") and officials of the Immigration and Naturalization Service ("INS"). The complaint will be amended to substitute the true names of any additional, proper defendants now known only as John Does, once their names are learned during discovery.

7. At all times material herein, Beebe was District Director of the Portland, Oregon office of the United States Immigration and Naturalization Service.

8. At all times material herein, Garcia was Assistant District Director of Examinations of the Portland office of the United States Immigration and Naturalization Service.

9. At all times material herein, O'Brien was the Port Director of Portland office of the United States Immigration and Naturalization Service.

10. At all times material herein, Glover was a Supervisory Inspections Officer with the Portland office of the United States Immigration and Naturalization Service.

IV
FACTS

11. The function of Tien Tao is both religious and educational. It is dedicated to the operation of the Association and the fostering of universal truth. The followers believe that Tao means the Truth, the Path, or the Way and that Tien Tao is the way to return heaven by restoring the original nature. One of the most important missions of Tao is to propagate the truth of the immortal Tao throughout the world in order to enlighten people to their true selves and awaken their conscience so that all people can live in harmony, exercise virtue, and restore their connection with God.

12. In 1992, the former Leader of the Association, Fat Fan Cheung, respectfully called Qian Ren, instructed Ms. Wong to accompany him to apply for permanent residency in the United States in order to accomplish the mission of establishing Tao in the west. The Wu-Wei Tien Tao Association filed the initial immigration petition on Ms. Wong's behalf in 1992. The INS approved Ms. Wong's filing in November, 1992 and again in December of 1994. Ms. Wong resided in the United States carrying out her religious work while her petitions were pending before the INS for over six years. Ms. Wong never

received notice whether her applications had been ruled upon.

13. On March 16, 1999, Qian Ren, passed away in Houston, Texas. In 1993, Qian Ren had appointed Ms. Wong as the inheritor of the ancient Tao Heritage. Upon Qian Ren's death, Ms. Wong became his successor in the ancient Tao Heritage and was obliged to arrange his funeral services and accompany Qian Ren's body back to Hong Kong for burial. In the Tao Way, it was crucial for Ms. Wong to accompany Qian Ren's body back to Hong Kong. Ms. Wong was responsible for meeting with all of the senior Tao ministers from the worldwide Tao arena in Hong Kong to plan the future operations of the Association in the aftermath of Qian Ren's sudden death. Ms. Wong, as the inheritor of Qian Ren and the leader of the Association, was the only person qualified and in the position to handle the funerary services of Qian Ren and the one in charge of directing the future of the worldwide organization. Under the circumstances, Ms. Wong was compelled to leave the country to fulfill her religious obligations.

14. Because her petition for permanent residency was pending, Ms. Wong was not permitted to leave the United States without advance permission (advance parole) from the INS. Ms. Wong attempted to make special arrangements with the INS through her immigration attorney to see if she could leave the United States without the advanced parole, but was unsuccessful. Because of the state of extreme urgency and under the heavy burden of her religious obligations, Ms. Wong departed the United States on or about March 27, 1999, having not

been able to obtain advance parole authorization prior to her departure.

15. On April 13, 1999, eighteen days after Ms. Wong left the United States, she returned to the United States via San Francisco. When the INS officers in San Francisco airport were informed of the reason for Ms. Wong's departure without receiving advanced parole and her prior application for permanent residency, they paroled Ms. Wong into the United States and requested that she report for a deferred inspection in Portland, Oregon on April 28, 1999.

16. On or about April 20, 1999, Ms. Wong and the Association together filed an adjustment of status application under the Immigration and Naturalization Act ("INA"), Section 245(i), which was accepted by the INS's Nebraska Service Center.

17. On or about April 26, 1999, Ms. Wong's immigration attorney notified the Portland, Oregon office of the INS that Ms. Wong had filed her adjustment of status application and notified O'Brien to contact his office if O'Brien wanted to meet with Ms. Wong in person. No one at the INS requested such a meeting, nor did they contact Ms. Wong's attorney.

18. On or about April 29, 1999, Beebe improperly revoked Ms. Wong's parole status. This revocation of parole was improper because her adjustment of status application had not yet been decided.

19. On or about May 20, 1999, Glover and O'Brien erroneously issued a "Notice and Order of Expedited Removal" and a Determination of Inadmissibility. In doing so, the Portland office of the INS and the individual

defendants ignored the filing of the adjustment of status application and erroneously informed her that she had no right to to appeal or seek post denial reopening or reconsideration under 8 CFR §103.5(a), thereby violating her constitutionally guaranteed due process rights.

20. On or about June 9, 1999, Beebe issued a letter requesting Ms. Wong to appear at the INS's Portland office to receive her Employment Authorization Card on June 17, 1999.

21. Ms. Wong appeared on June 17, 1999 to receive her Employment Authorization Card and was seized by INS officers. Ms. Wong was locked in a room by four INS officers and subjected to an inquisition. Ms. Wong was given a letter denying her application for the adjustment of status signed by Garcia for Beebe. After the inquisition, Ms. Wong was arrested, handcuffed and unlawfully detained. She was then taken to the Multnomah County Detention Center where she was subjected to a strip search, including an orifice search, on two separate occasions. Ms. Wong was imprisoned for a total of five days.

22. Ms. Wong has made a lifetime vow of vegetarianism, which is an important tenet to her religion. Requests were made for vegetarian meals for Ms. Wong, while in detention, but these requests were ignored. Appropriate food was not provided to accommodate her vegetarian diet, thereby requiring her to live on bread and water during her five-day detention and interfering with the practice of her faith. In addition, while Ms. Wong was incarcerated, she was not provided with a translator or information about her rights or how to contact her attorney or her followers.

23. After her arrest, Ms. Wong was not provided with a hearing before an administrative law judge, despite repeated requests by her immigration attorney, violating the INA and her constitutionally guaranteed due process rights.

24. On or about June 22, 1999, Ms. Wong was removed from the United States under protest and extreme duress, violating the INA and her constitutionally guaranteed due process rights. That same day, she was served with the Notice and Order of Expedited Removal, described above.

25. Under the INA, Ms. Wong was entitled to petition for her adjustment of status application be to reopened or reconsidered. As part of that process, Wong would have been given the opportunity to appeal or petition to have her application reopened and/or reconsidered, she would have been able to argue that the decision was incorrect based on incorrect application of law or Service Policy and the evidence of the record at the time of the initial decision. In denying her the opportunity to have her application reopened or reconsidered, one or more of the individual defendants violated the INA and denied her constitutionally guaranteed due process rights.

26. Ms. Wong is the selected Matriarch of the Tao Heritage. She is the heavenly mandated successor to continue the unbroken lineage of the ancient Tao Heritage. She is irreplaceable. Ms. Wong, as the leader of the Association, has being denied her right to be in the United States to perform her duties which are essential to the proper functioning of the Association and Sheng Gong, which has had serious consequences for the Association and Sheng Gong. This situation has bred confu-

sion and chaos among Tao practitioners in regions throughout the world. Also, as a result of the individual defendants' conduct, Ms. Wong's standing as the Leader of the Association and Sheng Gong has suffered substantial harm and her mandated mission is now being challenged. The mission of Tao and the administration of the Association and Sheng Gong have been seriously jeopardized.

27. The faith of the members of the Association has also been shaken by Ms. Wong's unlawful arrest, detention and removal. As a result, significant damage to Ms. Wong's reputation, the reputation of the Association and the reputation of Sheng Gong has occurred. Ms. Wong's sacred life was completely obstructed. She was treated like a criminal by the individual defendants. Their treatment of Ms. Wong is an insult to her human dignity and to all members of the Association and Sheng Gong. By virtue of its action, the individual defendants forced a holy Tao Minister who committed herself to a lifetime purity vow of celibacy to strip for body searches on two occasions.

28. The Association and Sheng Gong are registered religious groups in the United States and the individual defendants, by virtue of their conduct described herein, have denied the Association, Sheng Gong and its leader their rights to practice their religion and to associate for that purpose under the First and Fifth Amendments to the United States Constitution. This situation has a substantial damaging impact on both the current and the future propagation of the Association's as well as Sheng Gong's religious mission.

29. The Association and Sheng Gong have been severely damaged economically by Ms. Wong's forced absence. There has been a dramatic decrease of donation income as well as membership in the Association and Sheng Gong. The construction of Chong Hua Sheng Mu Gong (God's Home) could not be completed, which is of utmost importance to the members of the Association and Sheng Gong.

30. The Association and Sheng Gong also suffered severe non-economic damages resulting directly from the removal of Ms. Wong from the United States. Ms. Wong's removal made it necessary for the Association to restructure its worldwide operations. Ms. Wong is responsible for the entire Tao arena, including the United States, and must be consulted daily for guidance with everyday matters. Her removal caused extreme inconvenience to the Tao administration which disrupted the operations of the entire region.

31. Many members throughout the world disassociated themselves with the Association as a direct result of Ms. Wong's unlawful imprisonment and removal. Many members chose not to recognize Ms. Wong as the inheritor of the Tao mandate and the leader of the Association because her reputation was so severely damaged by the actions of the individual defendants against her. This loss of membership as a direct result of Ms. Wong's removal from the United States has caused severe hardship both economically and non-economically to the Association.

32. Some or all of defendants' conduct described above was a result of one or more of the individual de-

fendants' discrimination against plaintiffs because of their religious practices, beliefs, and association.

33. Some or all of defendants' conduct described above was a result of one or more of the individual defendants' discrimination against Ms. Wong because of her race and/or her national origin.

34. As a result of the individual defendants' conduct described above, Ms. Wong was forced to endure severe distress, humiliation and embarrassment.

35. The conduct of Beebe, Garcia, O'Brien and Glover was in reckless disregard of plaintiffs' well-established rights under the INA and the United States Constitution.

V
FIRST CLAIM FOR RELIEF
(Fourth and Fifth Amendments/*Bivens*)

36. Plaintiffs reallege and reincorporates paragraphs 1-35 herein.

37. One or more of the individual defendants, in violation of the Fourth and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her liberty rights given to her under the INA, her right to be free from unreasonable seizures and searches, and her right to procedural due process of law. Defendants' conduct that violated Wong's rights under the Fourth and Fifth Amendments includes, but is not limited to:

(a) revoking Wong's parole status prior to issuing a decision on her adjustment of status application;

(b) issuing a Notice and Order of Expedited Removal prior to issuing a decision on her adjustment of status application;

(c) causing Wong to be unlawfully detained and knowing or having reason to know she would be subjected to at least two strip searches, including an orifice search;

(d) knowing or having reason to know Wong would be denied vegetarian meals to accommodate her religious tenet, which interfered with the practice of her faith;

(e) knowing or having reason to know Wong would be denied access to her followers or a translator to give her information about her rights or how to contact an attorney or her followers, which interfered with the practice of her faith;

(f) denying Wong any opportunity to appeal or seek the reopening or reconsideration of her adjustment of status denial; and

(g) forcing her to leave the United States and banning her re-entry for five years.

38. Plaintiff Kwai Fun Wong is entitled an award of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial, and discrimination against her on the basis of race and/or national origin.

39. Plaintiff Kwai Fun Wong is entitled an award of her litigation expenses/costs against one or more of the individual defendants.

VI
SECOND CLAIM FOR RELIEF
(First and Fifth Amendments/*Bivens*)

40. Plaintiffs reallege and reincorporate paragraphs 1-35 herein.

41. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiff Kwai Fun Wong her right to practice her religion and her right to associate with others in the practice of her religion, including members of the Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong and discrimination against her on the basis of race and/or national origin. Defendants' conduct that violated Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gongs' rights under the Fourth and Fifth Amendments includes, but is not limited to:

(a) revoking their leader's parole status prior to issuing a decision on her adjustment of status application;

(b) issuing a Notice and Order of Expedited Removal prior to issuing a decision on their leader's adjustment of status application;

(c) causing their leader to be unlawfully detained and knowing or having reason to know she would be subjected to at least two strip searches, including an orifice search, which caused others to see her as defiled or unclean;

(d) denying them access to their leader while she was being detained, which interfered with the practice of their faith;

(e) denying them any opportunity for reopening or reconsideration of their leader's adjustment of status denial; and

(g) denying them the presence in the United States of their religious leader for five years.

42. One or more of the individual defendants, in violation of the First and Fifth Amendments to the United States Constitution, denied Plaintiffs Wu-Wei Tien Tao Association and Chong Hua Sheng Mu Gong their rights to practice their religion and their rights to associate with Plaintiff Kwai Fun Wong and discrimination against them on the basis of Ms. Wong's race and/or national origin.

43. Plaintiffs are entitled separate awards of economic, non-economic and punitive damages against one or more of the individual defendants in amounts to be determined at trial.

44. Plaintiffs are entitled an award of their litigation expenses/costs against one or more of the individual defendants.

VII
THIRD CLAIM FOR RELIEF
(Declaratory Judgment)

45. Plaintiffs reallege and reincorporate paragraphs 1-35 herein.

46. After the INS ruled on Plaintiff Kwai Fun Wong's adjustment of status application, it denied Wong any opportunity to appeal or to seek post denial reopening or reconsideration under 8 CFR § 103.5(a).

47. Plaintiff Kwai Fun Wong is entitled to have the opportunity to have the denial of her adjustment of status petition reopened or reconsidered 8 CFR § 103.5(a).

48. There is a live case and controversy between Kwai Fun Wong and Wu-Wei Tien Tao Association and the United States resulting in the need to have this court is-

sue a judgment against the United States declaring that the INS must provide Plaintiff Kwai Fun Wong an opportunity to appeal or seek post denial reopening or reconsideration under 8 CFR § 103.5(a).

49. Plaintiff Kwai Fun Wong and Plaintiff Wu-Wei Tien Tao Association are entitled an award of their attorney fees and litigation expenses against the Defendant United States under the Equal Access to Justice Act, 28 USC § 2412.

VIII
FOURTH CLAIM FOR RELIEF
(Religious Freedom Restoration Act)

50. Plaintiffs reallege and reincorporate paragraphs 1-35 herein.

51. Defendants' conduct described herein substantially burdened plaintiffs' exercise of religion in violation of the Religious Freedom Restoration Act, 42 USC § 2000bb-1.

52. Plaintiffs are entitled separate awards of economic, non-economic and punitive damages against one or more of the defendants in amounts to be determined at trial.

53. Plaintiffs are entitled an award of their attorney fees and litigation expenses/costs against one or more of the defendants.

IX
FIFTH CLAIM FOR RELIEF
(Federal Tort Claims Act)

54. Plaintiffs reallege and reincorporate paragraphs 1-35 herein.

55. The United States is liable under the Federal Tort Claims Act for the torts of false imprisonment, invasion of privacy, intentional interference with economic relations, and negligence.

56. Plaintiffs are entitled separate awards of economic and non-economic damages against the United States in amounts to be determined at trial.

57. Plaintiffs are entitled an award of their costs against the United States.

WHEREFORE, plaintiffs pray for relief from the Court as follows:

1. Assume jurisdiction in this matter over their claims;

2. Award plaintiffs economic, non-economic and punitive damages against the defendants, consistent with plaintiffs' claims as set forth above, in separate amounts to be determined at trial;

3. Issue a judgment against the United States declaring that the INS must provide Plaintiff Kwai Fun Wong an opportunity to appeal or seek post denial reopening or reconsideration under 8 CFR § 103.5(a).

4. Award plaintiffs their litigation costs/expenses and attorney fees against one or more of the defendants consistent with the claims above; and

5. Grant such other relief as may be just and proper.

DATED this 13th day of Aug. 2002.

/s/ TOM STEENSON
TOM STEENSON, OSB 74313
BETH CREIGHTON, OSB 97244

Telephone (503) 221-1792
Of Attorneys for Plaintiffs

PLAINTIFFS HEREBY DEMAND A JURY TRIAL.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No.: CV-01-718-ST

KWAI FUN WONG, WU-WEI TIEN TOA ASSOCIATION, AND CHONG HUA SHENG MU GONG, PLAINTIFFS

v.

DAVID BEEBE, JERRY F. GARCIA, JACK O'BRIEN, DOUGLAS GLOVER, JOHN DOE IMMIGRATION AND NATURALIZATION SERVICE OFFICIALS, AND, UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Aug. 27, 2002]

DEFENDANTS' OPPOSITION TO FILING THE AUGUST 13, 2002 SO-CALLED SECOND AMENDED COMPLAINT AND MOTION TO PROPERLY TITLE THE AUGUST 13, 2002 COMPLAINT

DISCUSSION

Defendants respectfully moved the Court to issue an order staying all further proceedings in this matter until the Ninth Circuit Court of Appeals issues a final decision on Defendants' pending interlocutory appeal. Plaintiffs have opposed the motion and Defendants have submitted a reply before the Court. On August 7, 2002, the Court has issued an order informing counsel in this matter that

the motions will be taken under advisement on September 9, 2002.

On August 13, 2002, while Defendants motion to stay all proceedings was pending, Plaintiffs filed another amended complaint. Previously, Plaintiffs filed the original Complaint (docket #1), the First Amended Complaint (docket #30), the Second Amended Complaint (docket #44), the Amended Second Amended Complaint (docket #46). Accordingly, the so-called August 13, 2002 Second Amended Complaint (docket #83), is really a new amended complaint which constitutes a Fourth Amended Complaint in this matter. The August 13, 2002 so-called Second Amended Compliant sets forth new and different allegations that are not part of the original Amended Second Amended Complaint which the Court granted leave to file and which is already on file before the Court. (docket #49). *See* Order, Findings and Recommendations at 49 (docket #68). Therefore, Plaintiffs must seek leave of the Court in order to file the August 13, 2002 so-called Second Amended Compliant and cannot skirt the requirement by simply calling the complaint a Second Amended Compliant. *See* Federal Rules of Civil Procedure Rule 15 (without written consent of the adverse party, a party may only amend by leave of court). Although the Court's April 5, 2002 Order, Findings and Recommendations found that Plaintiffs should be ordered to replead their claims, no such order has issued.

Therefore, the Court should not permit the filing of the August 13, 2002 so-called Second Amended Complaint.

Defendants further request that the Court retitle Plaintiffs' August 15, 2002 Second Amended Compliant to correctly reflect that it is the Fourth Amended Complaint in this matter. Without the using the correct name, it is cumbersome for all parties to refer to the documents with any clarity and it confuses the issues that are properly before the Court.

Should the Court permit Plaintiffs to file the so-called Second Amended Complaint without filing a motion for leave of Court, Defendants request an additional 21 days after the date of Court's order granting the motion to permit filing of the August 13, 2002 so-called Second Amended Complaint, in order for Defendants to prepare a response to the so-called Amended Second Amended Complaint. *See Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (because Plaintiffs have filed an appeal from the denial of qualified immunity in this matter, the district court has been divested of jurisdiction over the defendants).

CONCLUSION

Defendants respectfully move for an order clarifying that the August 13, 2002 so-called Second Amended Complaint be properly titled the Fourth Amended Complaint and that the Court require Plaintiffs to seek leave of Court to file any new amended complaints. Should the Court deny Defendants' instant motion, Defendants' request an additional 21 days after the date of the Court's order to respond to the August 13, 2002 so-called Amended Second Amended Complaint.

Respectfully submitted,

ROBERT D. McCALLUM, Jr.
Assistant Attorney General

MARGARET J. PERRY
Senior Litigation Counsel
Office of Immigration Litigation

/s/ CHRISTINE BITHER
CHRISTINE BITHER
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044-0878
Telephone: (202) 514-3567

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2002, one copy of Defendants' Opposition To Filing The August 13, 2002 So-Called Second Amended Complaint And Motion To Properly Title The August 13, 2002 Complaint was served upon Plaintiffs' attorneys, by procedures set forth by the United States Department of Justice for regular mail delivery addressed to:

Beth Creighton, Esq.
Tom Steenson, Esq.
STEENSON, SCHUMAN,
TEWKSBURY & ROSE, PC
815 SW Second Ave., Suite 500
Portland, OR 97204

/s/ CHRISTINE BITHER
CHRISTINE A. BITHER

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
SEP - 9 2014
OFFICE OF THE CLERK

No. 13-1074

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
MARK B. STERN
ANNE MURPHY
ADAM C. JED
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the six-month time limit for filing suit in federal court under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Petitioner was the defendant in the district court and the appellee in the court of appeals. The following individuals were also defendants in the district court: David V. Beebe, Jerry F. Garcia, Jack O'Brien, and Douglas Glover. Those defendants are no longer parties to the case and are not petitioners here.

Respondent, who was the plaintiff in the district court and the appellant in the court of appeals, is Kwai Fun Wong. The Wu Wei Tien Tao Association and Chong Hua Shen Mu Gong were also plaintiffs in the district court but are no longer parties to the case.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
A. The legal background 3
B. The present controversy 8
Summary of argument 15
Argument:
The Federal Tort Claims Act's time bars are not subject to equitable tolling 17
A. Whether equitable tolling is available turns on statutory intent 18
B. The FTCA time limits for filing suit were not subject to equitable tolling when enacted in 1946 20
1. Congress used the exact language that this Court had repeatedly construed as jurisdictional in the directly parallel context of Tucker Act suits 20
2. Congress enacted the FTCA time bar against background principles concerning waivers of sovereign immunity that treated such time bars as jurisdictional 29
3. Other aspects of the FTCA's text and history confirm that Congress did not endorse equitable tolling 35
C. Events following the FTCA's enactment in 1946 confirm that Section 2401(b) is jurisdictional and not subject to equitable tolling 40
1. Congress addressed hardship cases by extending the suit-filing deadline in 1949 41
2. Congress reenacted Section 2401(b) in 1966 against the backdrop of *Soriano* and of decisions holding the FTCA time bar to be jurisdictional 42

Table of Contents—Continued: Page

3. Congress enacted numerous private laws "conferring jurisdiction" to hear FTCA claims "notwithstanding" Section 2401(b) 46
4. Congress consistently rejected proposals to authorize equitable tolling 49
5. Congress in 1988 provided a narrow exception to Section 2401(b)'s time bars in one specific circumstance 50
Conclusion 53
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

"Agent Orange" Prod. Liab. Litig., In re, 818 F.2d 210 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) 52
Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) 3
Anderberg v. *United States*, 718 F.2d 976 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984) 52
Anderegg v. *United States*, 171 F.2d 127 (4th Cir. 1948), cert. denied, 336 U.S. 967 (1949) 43
Bilski v. *Kappos*, 130 S. Ct. 3218 (2010) 48
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 9
Bowles v. *Russell*, 551 U.S. 205 (2007) 12, 21, 27, 36
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 21, 44
Burns v. *United States*, 764 F.2d 722 (9th Cir. 1985) 52
Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 44
Charlton v. *United States*, 743 F.2d 557 (7th Cir. 1984) 52
Childers v. *United States*, 442 F.2d 1299 (4th Cir.), cert. denied, 404 U.S. 857 (1971) 52

Cases—Continued: Page

Dalehite v. *United States*, 346 U.S. 15 (1953).....6
de Arnaud v. *United States*, 151 U.S. 483 (1894).....23, 24
E.W. Bliss Co. v. *United States*, 53 Ct. Cl. 47 (1917).....31
Finn v. *United States*, 123 U.S. 227 (1887).....23, 24, 30
Florence v. *Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012).....9
Foote v. *Public Hous. Comm'r of the U.S.*, 107 F. Supp. 270 (W.D. Mich. 1952).....43
Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957).....37
Garrett v. *United States*, 640 F.2d 24 (6th Cir. 1981).....52
Hecht v. *Malley*, 265 U.S. 144 (1924).....27
Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011).....15, 19, 21
Holland v. *Florida*, 560 U.S. 631 (2010).....34
Humphreys v. *United States*, 272 F.2d 411 (9th Cir. 1959).....43
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990).....*passim*
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008).....*passim*
Kendall v. *United States*, 107 U.S. 123 (1883).....22, 23, 30
Kepner v. *United States*, 195 U.S. 100 (1904).....27
Kington v. *United States*, 265 F. Supp. 699 (E.D. Tenn. 1967), aff'd, 396 F.2d 9 (6th Cir.), cert. denied, 393 U.S. 960 (1968).....45
Kontrick v. *Ryan*, 540 U.S. 443 (2004).....15, 36
Kosak v. *United States*, 465 U.S. 848 (1984).....39
Lomax v. *United States*, 155 F. Supp. 354 (E.D. Pa. 1957).....43
Lorillard v. *Pons*, 434 U.S. 575 (1978).....37, 44
Loving v. *United States*, 517 U.S. 748 (1996).....48

Cases—Continued: Page

Lozano v. *Montoya Alvarez*, 134 S. Ct. 1224 (2014) 18
Maahs v. *United States*, 840 F.2d 863 (11th Cir. 1988) 52
Marley v. *United States*, 567 F.3d 1030 (9th Cir.), cert. denied, 558 U.S. 1076 (2009) 11
McNeil v. *United States*, 508 U.S. 106 (1993) 10
Munro v. *United States*, 303 U.S. 36 (1938) 24, 30
Peterson v. *United States*, 694 F.2d 943 (3d Cir. 1982) 52
Phalen v. *United States*, 32 F.2d 687 (2d Cir. 1929) 31
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 48
Reed Elsevier, Inc. v. *Muchnick*, 559 U.S. 154 (2010) 19, 21, 27, 28, 36
Richman v. *United States*, 709 F.2d 122 (1st Cir. 1983) 52
Rodman Chem. Co. v. *United States*, 65 Ct. Cl. 39, cert. denied, 277 U.S. 592 (1928) 31
Russello v. *United States*, 464 U.S. 16 (1983) 39
Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) 20, 21, 52
Sekhar v. *United States*, 133 S. Ct. 2720 (2013) 21
Sexton v. *United States*, 832 F.2d 629 (D.C. Cir. 1987) 52
Simon v. *United States*, 244 F.2d 703 (5th Cir. 1957) 43
Soriano v. *United States*, 352 U.S. 270 (1957) 15, 30, 32, 33, 34, 42
The "Abbotsford," 98 U.S. 440 (1879) 27
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 28
United States v. *Brockamp*, 519 U.S. 347 (1997) 20, 35

Cases—Continued: Page

United States v. *Croft-Mullins Elec. Co.*, 333 F.2d 772 (5th Cir. 1964), cert. denied, 379 U.S. 968 (1965) 43
United States v. *Dalm*, 494 U.S. 596 (1990) 3, 29, 31
United States v. *Kubrick*, 444 U.S. 111 (1979) 3, 6, 32
United States v. *Merriam*, 263 U.S. 179 (1923) 27
United States v. *Mitchell*, 463 U.S. 206 (1983) 3, 4
United States v. *Muniz*, 374 U.S. 150 (1963) 38
United States v. *New York*, 160 U.S. 598 (1896) 24
United States v. *Seminole Nation*, 299 U.S. 417 (1937) 32
United States v. *Sherwood*, 312 U.S. 584 (1941) 30
United States v. *Tohono O'dham Nation*, 131 S. Ct. 1723 (2011) 5
United States v. *Wardwell*, 172 U.S. 48 (1898) 24
Vernell v. *USPS*, 819 F.2d 108 (5th Cir. 1987) 52
West Va. Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83 (1991) 48
Westfall v. *Erwin*, 484 U.S. 292 (1988) 50, 51
Whalen v. *United States*, 107 F. Supp. 112 (E.D. Pa. 1952) 44

Statutes and regulations:

Act of Feb. 24, 1855, ch. 122, 10 Stat. 612:
§ 1, 10 Stat. 612 4
§ 7, 10 Stat. 613 4
Act of Mar. 3, 1863, ch. 92, 12 Stat. 765:
§ 3, 12 Stat. 765 (Rev. Stat. § 1061 (1878)) 4
§ 5, 12 Stat. 766 (Rev. Stat. §§ 707-708 (1878)) 4
§ 7, 12 Stat. 766 (Rev. Stat. §§ 1089-1093 (1878)) 4
§ 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) 4, 22, 6a

Statutes and regulations—Continued: Page

Act of June 25, 1910, ch. 423, 36 Stat. 851 5
Act of Oct. 9, 1940, ch. 788, § 154 Stat 1061 (31 U.S.C. 71a(1), 237(1) (1946)) 24
Act of June 25, 1948, ch. 646, 62 Stat. 869:
Sec. 1, 62 Stat. 869:
§ 1346, 62 Stat. 933 7
§ 2401, 62 Stat. 971 7
§§ 2671-2680, 62 Stat. 982-985 7
§ 33, 62 Stat. 991 37
Act of Apr. 25, 1949, ch. 92, 63 Stat. 62:
§ 1, 63 Stat. 62 7
§ 2(a), 63 Stat. 62 7
Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 ..... 45, 10a
Sec. 1, § 2416, 80 Stat. 305 46
Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306:
§ 2(a), 80 Stat. 306 ..... 7, 8, 42
§ 7, 80 Stat. 307 ..... 7, 8, 42
Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*:
42 U.S.C. 2000d *et seq.* (Tit. VI) 44
42 U.S.C. 2000e-16(c) (1988) 35
Education Amendments of 1972, Pub. L. No. 92-318, Tit. IX, 86 Stat. 373 44
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 51
§ 5, 102 Stat. 4564 51
§ 6, 102 Stat. 4565 51

Statutes and regulations—Continued: Page

Federal Tort Claims Act, ch. 753, Tit. IV, 60 Stat. 842:
§ 410(a), 60 Stat. 843 ..... 6, 36
§ 420, 60 Stat. 845 ..... 6, 7, 22, 36
Judicial Code, ch. 231, 36 Stat. 1087:
§ 24 Twentieth, 36 Stat. 1093 5
§ 156, 36 Stat. 1139 ..... 5, 22, 7a
Legislative Reorganization Act of 1946, ch. 753, Tit. IV, 60 Stat. 844 6
Priv. L. No. 64, 65 Stat. A26 (1951) 47
Priv. L. No. 71, 65 Stat. A28 (1951) 47
Priv. L. No. 85-176, 71 Stat. A66 (1957) 47
Priv. L. No. 85-184, 71 Stat. A70 (1957) 47
Priv. L. No. 90-284, 82 Stat. 1403 (1968) 47, 48
Priv. L. No. 91-109, 84 Stat. 2110 (1970) 47, 48
Priv. L. No. 91-116, 84 Stat. 2113 (1970) 47
Priv. L. No. 96-29, 93 Stat. 1400 (1979) 47, 48
Priv. L. No. 96-30, 93 Stat. 1401 (1979) 47, 48
Priv. L. No. 99-15, 100 Stat. 4319 (1986) 47
Public Vessels Act, ch. 428, 43 Stat. 1112 5
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1 9
Suits in Admiralty Act, ch. 95, 41 Stat. 525 5
Tucker Act, ch. 359, 24 Stat. 505 4
§ 2, 25 Stat. 505 5
8 U.S.C. 1225(b)(1)(A)(i) 8
28 U.S.C. 1331 *et seq.* (Ch. 85) 7
28 U.S.C. 1346 ..... 47, 1a
28 U.S.C. 1346(b)(1) 12
28 U.S.C. 1491 *et seq.* (Ch. 91) 37

Statutes and regulations—Continued: Page

28 U.S.C. 1491 ..... 8, 37
28 U.S.C. 2107 ..... 27, 36
28 U.S.C. 2401 *et seq.* (Ch. 161) 7
28 U.S.C. 2401(a) 14, 44, 49
28 U.S.C. 2401(b) ..... *passim*
28 U.S.C. 2501 *et seq.* (Ch. 165) 37
28 U.S.C. 2501 ..... 5, 32, 35, 37, 42, 2a
28 U.S.C. 2671 *et seq.* (Ch. 171) 7
28 U.S.C. 2679(d)(2)-(4) 51
28 U.S.C. 2679(d)(5) 51
31 U.S.C. 71 (1946) 24
31 U.S.C. 236 (1946) 24
8 C.F.R.:
Section 245.2(a)(4)(ii) (1999) 8
Section 235.3(b)(2)(iii) 8

Miscellaneous:

Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174 (2000) 38, 39, 51
69 Cong. Rec. 2200 (1928) 39
86 Cong. Rec. 12,026 (1940) 25
Earl T. Crawford, *The Construction of Statutes* (1940) 27
Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 21
H.R. 6974, 49th Cong., 1st Sess. (1887) 5
H.R. 6716, 69th Cong., 1st Sess. (1926) 38
H.R. 9285, 70th Cong., 1st Sess. (1928) 38
H.R. 15428, 71st Cong., 3d Sess. (1930) 38

Miscellaneous—Continued: Page

H.R. 16429, 71st Cong., 3d Sess. (1931) 38
H.R. 2403, 81st Cong., 1st Sess. (1949) 49
H.R. 7184, 89th Cong., 1st Sess. (1965) 49
H.R. 5713, 90th Cong., 1st Sess. (1967) 49
H.R. 4155, 91st Cong., 1st Sess. (1969) 49
H.R. 10124, 91st Cong., 1st Sess. (1969) 49
H.R. 10575, 92d Cong., 1st Sess. (1971) 49
H.R. 1023, 99th Cong., 2d Sess. (1986) 49
H.R. 3260, 101st Cong., 1st Sess. (1989) 49
H.R. 3261, 101st Cong., 1st Sess. (1989) 49
H.R. Doc. No. 562, 77th Cong., 2d Sess. (1942) 25
H.R. Rep. No. 667, 69th Cong., 1st Sess. (1926) 25
H.R. Rep. No. 286, 70th Cong., 1st Sess. (1928) 25
H.R. Rep. No. 2428, 76th Cong., 3d Sess. (1940) 25
H.R. Rep. No. 2245, 77th Cong., 2d Sess. (1942) 25, 26
H.R. Rep. No. 1287, 79th Cong., 1st Sess. (1945) 25, 26
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 7, 37
H.R. Rep. No. 276, 81st Cong., 1st Sess. (1949) 41
H.R. Rep. No. 1532, 89th Cong., 2d Sess. (1966) 44
H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966) 45
H.R. Rep. No. 58, 91st Cong., 1st Sess. (1969) 48
H.R. Rep. No. 629, 91st Cong., 1st Sess. (1969) 39, 45, 49
H.R. Rep. No. 460, 96th Cong., 1st Sess. (1979) 48
H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988) 50, 51
2 Frank E. Horack Jr., *Statutes and Statutory Construction* (3d ed. 1943) 27
1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims*:
(Mar. 1994) 5, 6
(Sep. 2001) 7

Miscellaneous—Continued: Page

Benjamin Moore, *Federal Tort Claims Act: Useful Discussion at Fourth Circuit Conference*, 33 A.B.A. J. 857 (1947) 40

Overtime Compensation—Forty-Hour Week Employees—Night Work, 24 Comp. Gen. 550 (1945) 24

Overtime Compensation—Forty-Hour Week Employees—Night Work—Claim Procedure, 25 Comp. Gen. 670 (1946) 24

S. 1912, 69th Cong., 1st Sess. (1926) 38

S. 4377, 71st Cong., 2d Sess. (1930) 38

S. 4567, 72d Cong., 1st Sess. (1932) 26, 38

S. 1833, 73d Cong., 1st Sess. (1933) 26, 38

S. 1043, 74th Cong., 1st Sess. (1935) 26, 38

S. Rep. No. 1196, 77th Cong., 2d Sess. (1942) 25, 31

S. Rep. No. 1400, 79th Cong., 2d Sess. (1946) 6, 25, 31, 32

S. Rep. No. 135, 81st Cong., 1st Sess. (1949) 41

S. Rep. No. 1327, 89th Cong., 2d Sess. (1966) 44

S. Rep. No. 376, 90th Cong., 1st Sess. (1967) 48

S. Rep. No. 461, 96th Cong., 1st Sess. (1979) 48

Time Extension for Presenting Tort Claims to Persons Under Legal Disability: Hearing Before the Subcomm. on Administrative Law & Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986) 50

To Extend the Time for Filing Claims Under the Federal Tort Claims Act: Hearings Before Subcomm. No. 2 of the House Comm. on the Judiciary, 80th Cong., 2d Sess. (1948) 41

Tort Claims Against the United States: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 39

Miscellaneous—Continued: Page

Tort Claims Against the United States: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 39

Leon R. Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1949) 40

In the Supreme Court of the United States

No. 13-1074

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-102a) is reported at 732 F.3d 1030. The opinion and order of the district court granting reconsideration (Pet. App. 103a-105a) is unreported. An order of the district court (Pet. App. 106a-107a), adopting the magistrate judge's findings and recommendation (Pet. App. 108a-127a), is unreported but is available at 2006 WL 977746. A prior order of the district court (Pet. App. 128a-129a), adopting the magistrate judge's findings and recommendation (Pet. App. 130a-186a), is unreported, but the findings and recommendations are available at 2002 WL 31548486. A prior memorandum opinion of the court of appeals (Pet. App. 187a-189a) is not published in the *Federal Reporter* but is reprinted at 381 Fed. Appx. 715. An earlier opinion of the court of appeals (Pet. App. 190a-238a) is

reported at 373 F.3d 952. An earlier order of the district court (Pet. App. 239a-241a), adopting the magistrate judge's findings and recommendations on summary judgment (Pet. App. 242a-306a), is unreported but is available at 2007 WL 1170621.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2013. On December 27, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 6, 2014. On January 24, 2014, Justice Kennedy further extended the time to March 8, 2014, and the petition was filed on March 7, 2014. The petition was granted on June 30, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

This case and *United States* v. *June*, No. 13-1075, involve whether the time limits set forth in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), may be equitably tolled by a court. Here, respondent filed an FTCA claim against the United States in district court more than seven months after the Immigration and Naturalization Service (INS) denied her administrative claim for relief. The district court concluded that Section 2401(b)'s six-month time limit for filing suit after an administrative denial is a jurisdictional requirement, and it dismissed respondent's claim as untimely. The en banc court of appeals rejected that jurisdictional holding and tolled the time limit.

A. The Legal Background

1. Under established principles of sovereign immunity, federal courts generally lack jurisdiction to hear claims against the United States. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990). Congress enacted the FTCA in 1946 to "waive[] the United States' sovereign immunity for claims" for money damages "arising out of torts committed by federal employees." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). As a "condition" of that waiver, Congress required plaintiffs to sue on such claims within a specified period of time. *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). It further specified that any claims not satisfying that requirement "shall be forever barred." 28 U.S.C. 2401(b).

As subsequently amended and recodified, the FTCA time-limit provision now provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2401(b). This case involves Section 2401(b)'s six-month deadline for filing a claim that has been denied by a federal agency.

2. a. Traditionally, in the absence of a waiver of sovereign immunity, "the only recourse available to private claimants" for damages caused by the government was "to petition Congress for relief" in the form of private bills. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). In 1855, Congress estab-

lished the Court of Claims to hear claims, report its findings to Congress, and provide drafts of private bills where the court's decision was favorable to the claimant. See Act of Feb. 24, 1855 (1855 Act), ch. 122, §§ 1, 7, 10 Stat. 612, 613; *Mitchell*, 463 U.S. at 212-213. The court's jurisdiction covered only contract claims, claims founded on federal statutes or regulations, and claims referred to the court by either House of Congress. 1855 Act § 1, 10 Stat. 612.

In 1863, Congress vested the Court of Claims with authority to enter binding judgments appealable to this Court. Act of Mar. 3, 1863 (1863 Act), ch. 92, §§ 3, 5, 7, 12 Stat. 765, 766 (Rev. Stat. §§ 707-708, 1061, 1089-1093 (1878)). The 1863 Act also provided that "every claim against the United States, cognizable by the court of claims, *shall be forever barred* unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of th[e] act within six years after the claim first accrues." *Id.* § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) (emphasis added). The 1863 Act provided an exception to the time bar for claims accruing to married women, minors, the mentally disabled, and persons beyond the seas, requiring such claims to be brought within three years after the disability ceased. *Ibid.* This Court subsequently construed the 1863 Act's time limitation as a restriction of the Court of Claims' jurisdiction, not subject to waiver or equitable tolling. See *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-135 (2008) (discussing cases); pp. 22-23, *infra*.

In 1887, Congress enacted the Tucker Act, ch. 359, 24 Stat. 505, which extended the Court of Claims' jurisdiction to additional types of cases and granted

the district courts and circuit courts concurrent jurisdiction in cases involving specified amounts in controversy. *Id.* § 2, 24 Stat. 505. This Court continued to treat the six-year filing requirement in the 1863 Act as a non-waivable jurisdictional constraint on the Court of Claims' authority. *John R. Sand & Gravel*, 552 U.S. at 135 (citing cases); pp. 23-24, *infra*. When Congress revised the laws relating to the Judiciary in 1911, it maintained the directive that any claim otherwise cognizable by the Court of Claims "shall be forever barred" unless filed within six years of accrual. Judicial Code (1911 Act), ch. 231, § 156, 36 Stat. 1139.[1]

b. Neither the Tucker Act nor its predecessors created any general right of action with respect to *tort* claims against the United States. See *United States* v. *Tohono O'dham Nation*, 131 S. Ct. 1723, 1729 (2011).[2] In the early twentieth century, however, Congress enacted several statutes creating such remedies in various circumstances, including for claims alleging (1) patent infringement, see Act of June 25, 1910, ch. 423, 36 Stat. 851 (1910 Act); (2) damage caused by United States merchant vessels or those of its wholly owned corporations, see Suits in Admiralty Act, ch. 95, 41 Stat. 525 (1920); and (3) damage caused by other public vessels, see Public Vessels Act, ch. 428, 43 Stat.

---

[1] Accord 1911 Act § 24 Twentieth, 36 Stat. 1093 (no suit in district court against the government "shall be allowed" unless brought within six years of accrual) (now codified in substantially similar form at 28 U.S.C. 2501).

[2] The version of the Tucker Act that passed the House of Representatives authorized tort claims, but the Senate refused to waive sovereign immunity with respect to such claims. See H.R. 6974, 49th Cong., 1st Sess. § 1 (1887); 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 2.04, at 2-16 to 2-17 (Mar. 1994).

1112 (1925). Courts recognized that the time limits for filing suit under those statutes were jurisdictional in nature. See p. 31, *infra*.

In the absence of any general tort cause of action against the United States, however, persons with such claims continued to seek relief from Congress in the form of private bills. By the 1920s and 1930s, Congress was swamped with such requests. See *Dalehite* v. *United States*, 346 U.S. 15, 25 n.9 (1953) (cataloging thousands of private claim bills introduced in the 68th, 70th, 74th, 75th, 76th, 77th, and 78th Congresses). The backlog led many to criticize the private-bill system as both "unduly burdensome to the Congress" and "unjust to the claimants." S. Rep. No. 1400, 79th Cong., 2d Sess. 30-31 (1946) (1946 Senate Report). As a result, between 1925 and 1946, Congress considered over 30 proposals to create judicial or administrative remedies for tort claims against the government. 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* §§ 2.08-2.10, at 2-48 to 2-66 (Mar. 1994) (Jayson & Longstreth) (discussing proposals).

c. In 1946, Congress enacted the FTCA as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 842. It granted district courts exclusive jurisdiction—"[s]ubject to the provisions of [Title IV]"—to adjudicate tort claims against the United States in circumstances where "a private person[] would be liable to the claimant" under local law. FTCA, ch. 753, § 410(a), 60 Stat. 843-844.

One of the provisions of Title IV on which Congress "condition[ed]" the grant of jurisdiction was Section 420, which contained time limits for bringing FTCA claims in court. *Kubrick*, 444 U.S. at 117; FTCA

§ 420, 60 Stat. 845. That provision included precisely the same language as the 1863 and 1911 Acts applicable to the Court of Claims, declaring that any tort claim "shall be forever barred" unless either (1) it was filed in court within one year of accrual, or (2) it sought less than $1000 and was presented in writing to the federal agency responsible for the alleged harm within one year. *Ibid.* In the latter circumstance, the time to file suit was "extended for a period of six months" following the agency's denial of the claim. *Ibid.*

Congress subsequently revised the FTCA time bars several times. See Jayson & Longstreth § 2.13, at 2-72 to 2-78 (Sept. 2001). In 1948, as part of a general recodification of Title 28, it relocated the FTCA's provisions to different places in Chapters 85, 161, and 171.[3] The Reviser's Note makes clear that Congress intended the 1948 revision to make no substantive change to those provisions. H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947).

In 1949, Congress enlarged Section 2401(b)'s time limit for filing a claim from one year to two years. Act of Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62. And in 1966, it made the filing of an administrative claim with the responsible agency—within two years of accrual—a mandatory prerequisite to filing suit in court on all FTCA claims. Act of July 18, 1966 (1966 Act), Pub. L. No. 89-506, §§ 2(a), 7, 80 Stat. 306, 307. Congress also adjusted the time limit for filing suit to six months

---

[3] See Act of June 25, 1948 (1948 Act), ch. 646, sec. 1, §§ 1346, 2401, 2671-2680, 62 Stat. 933, 971, 982-985. The 1948 Act referred to Chapter 173, not Chapter 171, but that scrivener's error was corrected the following year. See Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62.

after administrative denial of the claim. *Ibid.* That version of Section 2401(b) remains in effect today.

B. The Present Controversy

1. Respondent Kwai Fun Wong is a native of Hong Kong. Pet. App. 243a. She also claims to be a minister in the Wu Wei Tien Tao Association, a worldwide non-profit religious organization. *Id.* at 242a-243a. In 1992, respondent entered the United States. *Id.* at 246a. That same year, she received a religious worker's visa and also filed an application for permanent residence. *Ibid.* In 1999, she left the United States to attend a funeral in Hong Kong, but she neglected first to obtain a valid advance parole document necessary for her to lawfully re-enter the United States. *Id.* at 247a; see 8 C.F.R. 245.2(a)(4)(ii) (1999). Upon her return, she was briefly granted temporary parole into the United States, but the INS revoked her parole and issued her a notice of expedited removal from the country after she failed to appear for a scheduled immigration inspection. Pet. App. 250a-251a; see 8 U.S.C. 1225(b)(1)(A)(i) (requiring expedited removal when an applicant for admission lacks documents required for entry into the United States).

On June 17, 1999, the INS took respondent into custody in Portland, Oregon, pending her removal from the United States. Pet. App. 110a; see 8 C.F.R. 235.3(b)(2)(iii) (requiring detention in such circumstances). Because the INS lacked any federal facility in Portland to house immigration detainees, it placed respondent in immigration detention at the Multnomah County Detention Center. Pet. App. 254a. During five days of detention, Multnomah County officials strip-searched respondent in accordance with a county policy requiring such searches for new de-

tainees being placed in the general jail population. *Id.* at 257a; see *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (upholding similar strip-search policy). County officials also allegedly disregarded the INS's request that respondent receive vegetarian meals—a request made so as to enable respondent to comply with the dietary requirements of her religion. Pet. App. 254a. Respondent was removed from the United States on June 22, 1999. *Id.* at 110a.

2. On May 18, 2001, respondent filed an action in federal court seeking damages based on her removal and the conditions of her detention prior to removal. Pet. App. 5a, 110a-111a, 131a. The complaint asserted various constitutional claims against INS officials in Portland under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 131a; J.A. 43-44. That same day, respondent also presented an FTCA claim to the INS. Pet. App. 5a, 110a-111a; J.A. 23-26. Among other things, the claim alleged negligence based on the conditions of respondent's detention. Pet. App. 5a, 110a-111a; J.A. 25-26.

In October 2001, respondent filed a first amended complaint, adding the United States as a defendant and asserting additional claims under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-1. Pet. App. 111a & n.4; J.A. 46-59. On November 9 and 14, 2001, respondent sought leave to file a second amended complaint adding an FTCA claim against the United States. Pet. App. 5a-6a, 111a-112a; J.A. 8-9, 60-77.[4]

---

[4] The individual defendants were ultimately dismissed from the case, as were the RFRA claims. Pet. App. 187a-306a. Several FTCA claims were later dismissed as well. *Id.* at 239a-306a.

At the time of respondent's motion to add the FTCA claim, the district court would not have had jurisdiction over that claim, because (1) the INS had not finally denied her administrative claim, and (2) six months had not yet elapsed from the date on which she had presented that claim to the INS. See *McNeil* v. *United States*, 508 U.S. 106 (1993). Respondent therefore asked the court to grant her motion "on or after November 20, 2001," at which time she could treat the agency's failure to act as a denial for purposes of 28 U.S.C. 2401(b). Pet. App. 5a-6a, 111a; J.A. 60. The United States opposed the motion to amend and argued that respondent should file a new civil action after completely exhausting her administrative remedies. Pet. App. 182a-184a; J.A. 80-83.

On December 3, 2001, the INS issued a final denial of respondent's administrative claim. Pet. App. 6a; J.A. 85-87. Respondent thus had six months (until June 3, 2002) to bring an action in federal court under the FTCA, 28 U.S.C. 2401(b). Pet. App. 6a. But respondent neither filed a new civil action nor asked the district court to expedite her still-pending motion to amend.

On April 5, 2002, the magistrate judge recommended that respondent be granted leave to file a second amended complaint. Pet. App. 130a, 182a-185a. On June 25, 2002, three weeks *after* Section 2401(b)'s six-month deadline had passed, the district court adopted the magistrate judge's findings and recommendation. *Id.* at 128a-129a. Seven weeks later, on August 13, 2002, respondent filed a second amended complaint

---

Because the United States is the only remaining defendant, and a negligence claim under the FTCA is the only remaining claim, *id.* at 5a, this brief will use the term FTCA "claim" throughout.

adding (among other things) an FTCA claim against the United States. *Id.* at 7a; J.A. 94-110.

3. After an interlocutory appeal on unrelated issues, see 373 F.3d 952, the United States moved for summary judgment on respondent's FTCA claim in October 2005. Pet. App. 108a-109a, 112a-117a, 190a-238a; J.A. 17. The government argued that the district court lacked jurisdiction over the claim because it was not timely filed under 28 U.S.C. 2401(b). Pet. App. 108a-109a, 112a-117a.

The magistrate judge disagreed, Pet. App. 112a-117a, and in April 2006 the district court adopted her findings and recommendation, *id.* at 106a-107a. The court recognized that the FTCA claim was not filed within the time limit set forth in Section 2401(b). *Id.* at 113a-114a. But the court equitably tolled the six-month time period for 81 days (between the date the magistrate judge recommended that respondent be granted leave to amend and the date the district court granted such leave), and it declined to dismiss the FTCA claim. *Id.* at 117a.

Several years later, while the case was still pending in district court, the United States moved for reconsideration of that decision based on the Ninth Circuit's intervening decision in *Marley* v. *United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). Pet. App. 103a-105a. That case held that Section 2401(b)'s six-month time limit for filing suit cannot be equitably tolled because the statutory deadlines for FTCA claims are jurisdictional. 567 F.3d at 1033-1038. In October 2010, the district court granted the motion, held that it lacked jurisdiction over respondent's untimely FTCA claim, and entered final judgment for the United States. Pet. App. 103a-105a.

4. Respondent appealed. After oral argument in May 2012, the court of appeals *sua sponte* ordered the case to be heard en banc to resolve a conflict between two of its own precedential decisions. Pet. App. 307a; J.A. 2-3. A divided en banc panel reversed. Pet. App. 1a-102a.

a. Judge Berzon, writing for an eight-judge majority, first held that the FTCA's six-month time bar is not jurisdictional. Pet. App. 4a-36a. The court found that "nothing in the language of [Section] 2401(b)—including the term 'shall . . . be barred,' and the word 'forever'—supplies a 'clear statement' that Congress intended the six-month filing deadline to be jurisdictional." *Id.* at 22a-23a. The court noted that the time bar is located in a different section and chapter than the FTCA's "jurisdiction-granting provision" in 28 U.S.C. 1346(b)(1), and it declined to give any weight to the statutory history demonstrating that this placement was a result of the 1948 recodification of Title 28, in which no substantive changes were intended. Pet. App. 23a-29a. The court also relied on the absence of precedent from this Court ranking the time limit as jurisdictional. *Id.* at 30a-32a (distinguishing *Bowles* v. *Russell*, 551 U.S. 205, 209 n.2 (2007)).

The court of appeals acknowledged that "even if [a time deadline] is not jurisdictional, tolling may still be precluded by a sufficiently clear congressional expression of that restriction." Pet. App. 15a. But in addressing that issue, the court applied a "particularly strong" "presumption in favor of equitable tolling." *Id.* at 36a-38a (relying on *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)). The court found a "strong" presumption warranted because, in its

view, Congress intended "suits against the government" under the FTCA to be "treated no differently than suits against private defendants," and because courts have applied a "discovery" rule to determine when a claim "accrues" for purposes of the two-year deadline for presenting a claim to the responsible agency. *Ibid.* (citation omitted). The court ultimately concluded that the strong presumption in favor of equitable tolling had not been "overcome." *Id.* at 40a-43a.

Finally, the court of appeals held that the six-month time limit should be tolled in this case. Pet. App. 43a-48a. The court proceeded on the assumption that respondent's FTCA claim was filed beyond the six-month limit and thus was "too late," declining to find an earlier "constructive filing date" under which the claim would have been timely. *Id.* at 43a-45a. In the court's view, however, respondent's failure to file an FTCA complaint within six months after her claim was denied by the INS "was not the consequence of any fault or lack of due diligence on [her] part," but the result of "the delay inherent in the Magistrate Judge system." *Id.* at 46a, 47a. The court rejected the government's contention that equitable tolling was inappropriate because respondent could have "request[ed] a timely ruling" or could have filed a separate FTCA complaint anytime during the six-month period. *Id.* at 47a. The court accordingly remanded for the FTCA claim to proceed. *Id.* at 48a.

b. Chief Judge Kozinski concurred in the judgment. Pet. App. 48a-52a. He agreed with the dissenters that "[Section] 2401(b) is jurisdictional" and that "the FTCA's text, context, and relevant historical treatment prohibit equitable tolling of the statutory

deadline." *Id.* at 48a, 51a. But he construed respondent's court filings to render her claim timely and, thus, concurred in the judgment. *Id.* at 48a-52a.

c. Judges Tashima and Bea dissented in two separate opinions, which they both joined. Pet. App. 52a-102a. Judge Tashima concluded that the statutory "history, once understood in full context, dispels any doubt that the FTCA's limitations provision was intended to be jurisdictional." *Id.* at 52a. He explained that "the limitations provision was jurisdictional as of the original 1946 Act, for the grant of jurisdiction was expressly '[s]ubject to'—that is, 'contingent or conditional upon'—compliance with that provision." *Id.* at 55a (brackets in original; citation omitted). And, he continued, Congress did not "intend[] to strip the limitations provision of its jurisdictional status only two years later" when it "reorganize[d] Title 28" in the 1948 recodification. *Id.* at 54a, 56a-58a.

Judge Bea concluded that "Congress clearly expressed its intent that [Section] 2401(b) would have 'jurisdictional' consequences." Pet. App. 102a. He explained that "[j]urisdictional treatment accords with the statute's text," particularly Congress's command that late claims shall be "forever barred." *Id.* at 69a-84a, 102a. He also pointed to Section 2401(b)'s "context" in the "larger statutory scheme," including the administrative exhaustion requirement, as well as its "broad, system-related purposes." *Id.* at 93a, 97a-102a. Finally, he contrasted Section 2401(b) to the general six-year statute of limitations for filing suit against the government in Section 2401(a), which expressly provides for tolling in certain specified circumstances. *Id.* at 101a-102a.

SUMMARY OF ARGUMENT

The FTCA provides that a tort claim against the United States "shall be forever barred" if it is not filed in court within six months after being denied by a federal agency. 28 U.S.C. 2401(b). That six-month limit is a jurisdictional requirement that is not subject to equitable tolling. Because respondent's claim was filed more than seven months after being denied by the INS, it was properly dismissed by the district court.

A. Under this Court's precedent, whether a statutory time limit for suing the United States is subject to equitable tolling ultimately turns on Congress's intent. This Court has established a "rebuttable presumption" allowing tolling of time limits for filing suit in appropriate circumstances. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). But the purpose of that presumption is to "accurately reflect Congress's likely meaning in the mine run of instances where it enacted a Government-related statute of limitations," and the presumption does not control in circumstances where the text and history reveal "Congress's intent to the contrary." *John R. Sand & Gravel* v. *United States*, 552 U.S. 130, 137-138 (2008). Equitable tolling is not appropriate when Congress intended a time bar to serve as a jurisdictional limit on the power of district courts. Tolling may also be precluded even if the time bar is nonjurisdictional.

B. When Congress enacted the FTCA in 1946, it intended the statutory time limit for filing suit to be a jurisdictional requirement not subject to equitable tolling. First, Congress borrowed the statutory text of that time bar from the 1863 and 1911 Acts governing Tucker Act suits in the Court of Claims. At the

time, this Court had already repeatedly interpreted those virtually identical provisions—addressing closely analogous damages actions against the United States—to be jurisdictional limitations forbidding courts from tolling the time limits for filing suit. Those provisions had a settled legal meaning, and Congress adopted that meaning when it incorporated their "shall be forever barred" directive into the FTCA. See, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011).

Second, Congress understood the FTCA time limit as a condition on its waiver of sovereign immunity. Congress legislated against a background assumption that such time bars would be strictly construed not to permit equitable tolling. This Court acknowledged that background rule in *Soriano* v. *United States*, 352 U.S. 270 (1957), where it explained that Congress enacted the Tucker Act and statutes allowing tort claims against the government on the "assum[ption] that the limitation period it prescribed meant just that period and no more." *Id.* at 275-276. Decades later, in *Irwin*, this Court announced a new (and quite different) background assumption with respect to time limits for filing suit in court, but it confirmed that what ultimately matters is the enacting Congress's actual intent.

Other aspects of the original FTCA's text and history confirm that equitable tolling is prohibited. For example, the "shall be forever barred" formulation itself constrains jurisdiction by "confin[ing]" the district court's power of "review" over the case, as this Court expressly recognized in *Kontrick* v. *Ryan*, 540 U.S. 443, 453 (2004). The absence of any exceptions to

the bar starkly contrasts with the otherwise-comparable provision applicable to Tucker Act claims.

C. The subsequent evolution of the FTCA reinforces the conclusion that equitable tolling is not available. In 1949, Congress extended the suit filing deadline for an extra year to address hardship cases, thereby confirming that such cases are to be addressed by Congress itself, not by courts via equitable tolling. Congress then reenacted the time bar in 1966—after *Soriano* and at a time when the uniform view of the circuit courts was that tolling of Section 2401(b) was *not* available.

In addition, from the 1950s through the 1980s, Congress passed a series of private laws expressly conferring "jurisdiction" on district courts to hear untimely FTCA claims "notwithstanding" Section 2401(b)'s time bar. Throughout the same period, Congress repeatedly declined to enact a series of proposals to authorize limited forms of tolling of FTCA claims. The only exception was in 1988, when Congress authorized one form of tolling applicable only in a single, carefully delineated circumstance not at issue here. Taken as a whole, this history makes plain that any "realistic assessment of legislative intent," *Irwin*, 498 U.S. at 95, precludes equitable tolling of the FTCA's six-month deadline for filing suit.

ARGUMENT

THE FEDERAL TORT CLAIMS ACT'S TIME BARS ARE NOT SUBJECT TO EQUITABLE TOLLING

Respondent filed her FTCA complaint against the United States more than seven months after the INS denied her administrative claim. Pet. App. 7a. That complaint was untimely under 28 U.S.C. 2401(b),

which imposes a six-month time limit for filing suit. Congress used jurisdictional language to frame that time bar. It has always understood the bar to be a strict limit on its waiver of sovereign immunity, and it never intended the bar to be subject to equitable tolling. The court of appeals' conclusion to the contrary is erroneous and should be reversed.

A. Whether Equitable Tolling Is Available Turns On Statutory Intent

The doctrine of equitable tolling "pauses the running of * * * a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014). In recent years, this Court has adopted a rebuttable presumption that federal statutes of limitation requiring that suits be filed in court by a certain time—including those applicable to suits against the United States—are subject to equitable tolling. See, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

This Court has emphasized, however, that it "do[es] not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose." *Lozano*, 134 S. Ct. at 1236. Rather, "whether equitable tolling is available is fundamentally a question of statutory intent." *Id.* at 1232; see *Irwin*, 498 U.S. at 95 (justifying rebuttable presumption as "a realistic assessment of legislative intent"); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) (noting that purpose of presumption is to "accurately reflect Congress's likely meaning in the mine run of instances where it enacted a Government-

related statute of limitations"). The presumption in favor of tolling may therefore be rebutted "by demonstrating Congress's intent to the contrary." *Ibid.*

One way to show that equitable tolling is unavailable is to establish that the statutory time limit is a "jurisdictional" restriction on a court's power to adjudicate the case. *John R. Sand & Gravel*, 552 U.S. at 133-134. A jurisdictional limit is "more absolute" than other time limits; it "require[s] a court to decide a timeliness question despite a [party's] waiver" and "forbid[s] a court to consider whether certain equitable considerations warrant extending a limitations period." *Ibid.* Jurisdictional treatment is appropriate, for example, when a statutory time bar "seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as * * * limiting the scope of a governmental waiver of sovereign immunity." *Ibid.*

For a statutory time limit to qualify as jurisdictional, this Court requires a "clear indication" from Congress. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks omitted). But Congress "need not use magic words in order to speak clearly." *Ibid.* Ultimately, the analysis focuses on the "legal character" of the filing requirement, as evident in the "text, context, and relevant historical treatment" of the statutory provision at issue. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010) (citation omitted). And significantly in this case, "[w]hen 'a long line of this Court's decisions left undisturbed by Congress' has treated a similar requirement as 'jurisdictional,' [the Court] will presume that Congress intended to follow that course." *Henderson*, 131 S. Ct. at 1203 (citation omitted).

Even if a limitations period is not jurisdictional, equitable tolling may still be precluded. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 826-828 (2013) (holding nonjurisdictional statutory time limit not subject to equitable tolling). As with the jurisdictional analysis, the basic inquiry examines Congress's intent—and, specifically, whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). That question must be answered using traditional tools of statutory construction. See, *e.g.*, *id.* at 351-354 (rejecting equitable tolling based on text, context, purpose and history of statutory time limit); see also *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828 (similar).

B. The FTCA Time Limits For Filing Suit Were Not Subject To Equitable Tolling When Enacted In 1946

The statutory text, history, and purpose all confirm that Congress originally understood the deadline for filing an FTCA claim in court as a mandatory time bar not subject to equitable tolling. That time bar is a jurisdictional limit on the court's power to act. But tolling is precluded even if this Court were to determine that Section 2401(b)'s time limit is nonjurisdictional. To the extent the *Irwin* presumption in favor of equitable tolling applies to this case, it is rebutted by the strong textual and historical evidence of Congress's intent.

1. Congress used the exact language that this Court had repeatedly construed as jurisdictional in the directly parallel context of Tucker Act suits

This Court has often recognized that "[w]hen * * * judicial interpretations have settled the

meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998).[5] The Court has endorsed this principle in the precise context at issue here—when determining whether a particular statutory time limit qualifies as jurisdictional. As the Court recently explained in *Henderson*, it "will presume" that Congress intended to make a time limit jurisdictional "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as 'jurisdictional.'" 131 S. Ct. at 1203 (internal quotation marks and citation omitted) (citing *John R. Sand & Gravel*, 552 U.S. at 133-134).[6]

That rule resolves this case. When Congress drafted the FTCA time bar in 1946, it used the same unequivocal text ("shall be forever barred") that appeared in the parallel time bars applicable to monetary claims against the United States under the 1863 and 1911 Acts. This Court had already interpreted that language—on at least *six* separate occasions—as imposing a jurisdictional requirement not subject to waiver or equitable tolling. In these circumstances,

---

[5] See, *e.g.*, *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

[6] See also *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824 (confirming that "this Court's interpretations of similar provisions in many years past" is "probative of whether Congress intended a particular provision to rank as jurisdictional") (citation omitted); *Reed*, 559 U.S. at 168 (same); *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007).

the only reasonable conclusion is that Congress intended the FTCA's identically worded time limit to be a jurisdictional bar prohibiting district courts from adjudicating untimely claims.

a. The text Congress chose for the FTCA's suit-filing bar is materially indistinguishable from the text it had previously used to set deadlines for damages actions against the United States in the Court of Claims under the Tucker Act and its predecessors. See p. 7, *supra*. Those earlier formulations had emphatically declared that "[e]very claim against the United States" under the relevant statute "shall be forever barred" if not filed within a stated period of time, subject to certain specific exceptions.[7]

This Court first interpreted that language in *Kendall* v. *United States*, 107 U.S. 123 (1883). There, the Court rejected the plaintiff's request for tolling under the 1863 Act on the ground that he was not able to bring his claim within the statutory period due to legal disabilities imposed by Congress during the Civil War. *Id.* at 124-125. The Court explained that the time bar was "jurisdiction[al]," that it was not subject to judi-

---

[7] Compare FTCA § 420, 60 Stat. 845 ("Every claim against the United States cognizable under this title *shall be forever barred*, unless within one year after such claim accrued [the claim is presented to the responsible agency or] an action is begun.") (emphasis added), with 1911 Act § 156, 36 Stat. 1139 ("Every claim against the United States cognizable by the Court of Claims, *shall be forever barred* unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues.") (emphasis added), and 1863 Act § 10, 12 Stat. 767 ("[E]very claim against the United States, cognizable by the court of claims, *shall be forever barred* unless the petition setting forth a statement of the claim be filed in the court * * * within six years after the claim first accrues.") (emphasis added).

cial "engraft[ing]" of exceptions such as "sickness, surprise, or inevitable accident," and that "it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not." *Id.* at 125-126; see *John R. Sand & Gravel*, 552 U.S. at 134 (summarizing *Kendall* in those terms).

Several years later, this Court reaffirmed its jurisdictional analysis in *Finn* v. *United States*, 123 U.S. 227 (1887). There, the Court rejected the argument that the government could waive the time bar when opposing a claim. It explained that "[t]he duty of the court" when faced with an untimely claim—"whether limitation [i]s pleaded [by the United States] or not"—is "to dismiss the petition." *Id.* at 232. The Court noted that "the statute * * * makes it a condition or qualification of a right to a judgment against the United States that—except where the claimant labors under one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant * * * within six years after suit could be commenced thereon against the Government." *Ibid.*; see *John R. Sand & Gravel*, 552 U.S. at 134-135 (discussing *Finn*).

After the Tucker Act was passed in 1887, this Court continued to treat the 1863 Act's time bar as a non-waivable jurisdictional constraint on the Court of Claims' authority. For example, in *de Arnaud* v. *United States*, 151 U.S. 483 (1894), the Court affirmed the dismissal of a claim that had accrued in 1862 but had not been submitted to the Treasury Department until 1886. See *id.* at 489, 492-495. The Court quoted at length from its prior decision in *Finn*, explaining that the six-year bar applied whether the government had raised the point or not. See *id.* at 495-496 (quot-

ing *Finn*, 123 U.S. at 232-233); accord *United States* v. *New York*, 160 U.S. 598, 616-619 (1896); see also *Munro* v. *United States*, 303 U.S. 36, 38 n.1, 41 (1938) (applying *Finn* and reaching same conclusion under 1930 statute incorporating Tucker Act procedures). Similarly, in *United States* v. *Wardwell*, 172 U.S. 48 (1898), the Court reaffirmed that the six-year filing requirement imposed by the 1863 Act was "not merely a statute of limitations *but also jurisdictional in its nature*, and limiting the cases of which the Court of Claims can take cognizance." *Id.* at 52 (emphasis added).[8]

b. The legislative history establishes that Congress intended the FTCA to serve as the tort-claim analogue to the Tucker Act and thus confirms that the identical "shall be forever barred" language in the FTCA time bar is likewise a jurisdictional limitation. The Senate Report on the FTCA pointed to the Tucker Act's waiver of sovereign immunity for certain

---

[8] Congress had also previously used the same "shall be forever barred" formulation to establish a ten-year time limit for submitting claims for payment to the General Accounting Office (GAO). See Act of Oct. 9, 1940, ch. 788, § 1, 54 Stat 1061 (31 U.S.C. 71a(1), 237(1) (1946)) ("[E]very claim or demand * * * against the United States cognizable by the [GAO] under [31 U.S.C. 71 and 236 (1946)], shall be forever barred unless such claim * * * shall be received [by GAO] within ten full years after the date such claim first accrued."). By 1946, the Comptroller General had interpreted that time bar as an absolute limit on his authority to consider untimely claims. See, *e.g.*, *Overtime Compensation—Forty-Hour Week Employees—Night Work—Claim Procedure*, 25 Comp. Gen. 670, 672 (1946) (explaining that bar "expressly prohibits consideration by the [GAO]" of untimely claims and that GAO "has been granted no powers of dispensation in the matter and, consequently, it legally may make no exceptions to the provisions of the statute"); *Overtime Compensation—Forty-Hour Week Employees—Night Work*, 24 Comp. Gen. 550, 553-555 (1945) (similar).

claims and stated that the Tucker Act's "existing exemption in respect to common-law torts appears incongruous." 1946 Senate Report 31. Similarly, committee reports discussing early drafts of the tort bill emphasized that they would grant tort claimants "the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." S. Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942).[9] They also frequently explained the history, purpose, and operation of the Tucker Act and emphasized the need for similar legislation to cover tort claims.[10]

More specifically, the House Reports addressing draft tort-claim bills proposed in 1942 and 1945—which contained the exact same time bar enacted in the FTCA in 1946—declared that those bills were "intended" to grant district courts the power to "exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1945);

---

[9] See, *e.g.*, H.R. Rep. No. 286, 70th Cong., 1st Sess. 2 (1928) (noting Tucker Act and urging adoption of "like provisions" applicable to certain property damage claims); H.R. Rep. No. 667, 69th Cong., 1st Sess. 12 (1926) (reviewing sovereign immunity and stating that proposed claims bill "extends the practice" in Tucker Act); see also H.R. Doc. No. 562, 77th Cong., 2d Sess. 2 (1942) (message from President Franklin D. Roosevelt urging Congress to give tort claimants "the same right to a day in court which claimants now enjoy in fields such as breach of contract"); 86 Cong. Rec. 12,026 (1940) (statement of Rep. McLaughlin) (pointing to Tucker Act as "precedent to govern our conduct in this case").

[10] See, *e.g.*, 1946 Senate Report 31; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2-3 (1945); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. No. 2428, 76th Cong., 3d Sess. 2-3 (1940).

H.R. Rep. No. 2245, 77th Cong., 2d Sess. 9 (1942). At that time, of course, this Court had already definitively held that the jurisdiction of the Court of Claims was constrained by the six-year time bar—and that the bar was not subject to waiver or equitable tolling. See pp. 22-24, *supra*.[11]

c. Thus when Congress enacted the FTCA time bar in 1946, it adopted a formulation that this Court had already interpreted—multiple times, in the directly analogous context of the Tucker Act—to limit the jurisdiction of federal courts to adjudicate claims against the United States. That is more than sufficient reason to conclude that Congress intended the FTCA time bar to be a jurisdictional requirement not subject to equitable tolling. After all, in 1946, as today, it was well settled that "in adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enact-

---

[11] Although many of the draft tort claim bills that Congress considered in the 1930s used the "shall be forever barred" formulation, a number of those that did not nonetheless made explicit that the deadlines for suing on tort claims were jurisdictional requirements. See, *e.g.*, S. 1043, 74th Cong., 1st Sess. § 304 (1935) ("The Court of Claims *shall have jurisdiction* to hear and determine any claim allowable as provided in this Act *subject to the following limitations*: (1) That no such suit may be maintained until the claim has been duly filed with the Comptroller General and his decision had thereon * * * ; (2) that no such suit shall be instituted after the expiration of one year from the date of the decision of the Comptroller General."); S. 1833, 73d Cong., 1st Sess. § 304 (1933) (same); S. 4567, 72d Cong., 1st Sess. § 304 (1932) (same). Those other bills thus confirm that Congress envisioned that the FTCA time limits would operate as jurisdictional constraints on the courts' power to adjudicate claims.

ment." *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924).[12] Congress's decision to borrow the language of the 1863 and 1911 Acts clearly manifested its intent to prohibit equitable tolling of FTCA claims.

d. Recent precedent also confirms that this Court's prior construction of the 1863 and 1911 Acts supports treating the FTCA time bar as jurisdictional. In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court held that the 30-day limit in 28 U.S.C. 2107 for filing a notice of appeal is a jurisdictional requirement not subject to waiver or equitable tolling. 551 U.S. at 209-213. It rooted that conclusion largely in its assessment of "this Court's historical treatment of *the type of limitation* [Section] 2107 imposes (*i.e.*, statutory deadlines for filing appeals)." *Reed*, 559 U.S. at 168 (emphasis added) (discussing *Bowles*); *Bowles*, 551 U.S. at 208-210. As the Court later explained, "[t]he statutory limitation in *Bowles* was of a type that we had long held *did* speak in jurisdictional terms, even absent a 'jurisdictional' label, and nothing about [Section] 2107's text or context, or the historical treatment

---

[12] See, *e.g.*, *United States* v. *Merriam*, 263 U.S. 179, 187 (1923) ("The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress."); *Kepner* v. *United States*, 195 U.S. 100, 124 (1904) ("It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."); *The "Abbotsford,"* 98 U.S. 440, 444 (1879); 2 Frank E. Horack Jr., *Statutes and Statutory Construction* § 5201, at 532-535 (3d ed. 1943) ("Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense.") (footnote omitted); Earl T. Crawford, *The Construction of Statutes* § 187, at 321 (1940) (same point).

of that type of limitation, justified a departure from this view." *Reed*, 559 U.S. at 168 (first set of internal quotation marks omitted).

The same is true here. For the reasons explained above, the FTCA time limit for filing suit is "of a type" that this Court has long held *does* "speak in jurisdictional terms." *Reed*, 559 U.S. at 168. The FTCA time bar uses the same language and serves the same purpose—prescribing a specific time limit as a condition of the waiver of sovereign immunity for suits against the United States for money damages—as the parallel provisions applicable to Tucker Act claims. Those provisions should all be interpreted the same way.

This Court's decision in *John R. Sand & Gravel* is also instructive. There, the Court reaffirmed that the time bar applicable to Tucker Act claims is a jurisdictional limit on the authority of district courts. 552 U.S. at 133-139. The Court explained that "[s]pecific statutory language" and "a definitive earlier interpretation" of virtually identical predecessor statutes can establish that a statutory time limit is jurisdictional and not subject to equitable tolling. *Id.* at 134-138. In this case, the Court should once again apply that settled precedent and hold that the "shall be forever barred" formulation that appeared in the 1863 and 1911 Acts—and that Congress incorporated into the FTCA—has jurisdictional effect. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (applying precedent interpreting one statute to a later statute "derived *in haec verba*" from the first statute) (citation omitted).

2. *Congress enacted the FTCA time bar against background principles concerning waivers of sovereign immunity that treated such time bars as jurisdictional*

In *John R. Sand & Gravel*, this Court explained that when a federal statute of limitations "achieve[s] a broader system-related goal"—such as "limiting the scope of a governmental waiver of sovereign immunity"—it may properly be characterized as "jurisdictional." 552 U.S. at 133-134 (citing *United States* v. *Dalm*, 494 U.S. 596, 609-610 (1990)). That tracks the understanding that prevailed when Congress enacted the FTCA in 1946. At that time, courts construed all of the various time limits applicable to claims for money damages against the United States as jurisdictional conditions on Congress's waiver of sovereign immunity. Congress would not have expected the FTCA time limit to be treated any differently.[13]

a. When Congress enacted the FTCA, this Court had long established both (1) that "[t]he United

---

[13] In *Irwin*, this Court explained its new, rebuttable presumption of equitable tolling by noting that "[o]nce Congress has made * * * a waiver [of sovereign immunity]," permitting equitable tolling "amounts to little, if any, broadening of [that] waiver." 498 U.S. at 95. But the Court justified that assertion—and the rebuttable presumption itself—as reflecting what it thought was "a realistic assessment of legislative intent," *ibid.*, and it later confirmed that the presumption can be rebutted "by demonstrating Congress's intent to the contrary," *John R. Sand & Gravel*, 552 U.S. at 138. Here, Congress understood the FTCA time bar as jurisdictional in significant part *because* it operated as a limit on the waiver of sovereign immunity to monetary claims against the United States. *Irwin*'s background presumption therefore does not "accurately reflect Congress's likely meaning" with respect to the FTCA, *id.* at 137, and it does not govern this case.

States, as sovereign, is immune from suit save as it consents to be sued," and (2) that "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). It was also settled that if Congress included a statute of limitations in a law waiving sovereign immunity with respect to a type of claim, compliance with that requirement was one of those "terms of [Congress's] consent to be sued" limiting the court's jurisdiction.

This Court had embraced that latter point many times, including in some of the cases holding that the time bar applicable in the Court of Claims was a jurisdictional requirement not subject to waiver or equitable tolling. In *Finn*, for example, the Court declared that "[a]s the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, *brought within a prescribed period.*" 123 U.S. at 231 (emphasis added); see *Munro*, 303 U.S. at 41 (citing *Finn* and applying same analysis). And in *Kendall* the Court explained that "the government could not be sued without its consent," that Congress "may restrict the jurisdiction of the Court of Claims to certain classes of demands," and that the statutory bar on untimely claims was itself one such "restriction[] which that court may not disregard." 107 U.S. at 125.[14]

---

[14] The Court continued to apply that rule after 1946. See, *e.g.*, *Soriano* v. *United States*, 352 U.S. 270, 273-276 (1957) (reaffirming that time bar applicable to Tucker Act claims is not subject to equitable tolling and stating that "this Court *has long decided* that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not

The rule that statutory time limits governing suits against the United States for money damages are jurisdictional in nature was not unique to Tucker Act claims. On the contrary, in the decades leading up to the FTCA, federal courts had enforced that rule with respect to the other suits that Congress had authorized against the United States. Thus the Second Circuit had treated the statutory time limit set forth in the Suits in Admiralty Act—and also applicable to the Public Vessel Act—as jurisdictional. See *Phalen* v. *United States*, 32 F.2d 687, 687-688 (2d Cir. 1929) (holding that district court lacked "jurisdiction" due to plaintiff's failure to comply with time limit). And the Court of Claims had reached the same conclusion with respect to patent-infringement claims against the United States under the 1910 Act. *Rodman Chem. Co.* v. *United States*, 65 Ct. Cl. 39, 43, cert. denied, 277 U.S. 592 (1928) (emphasizing that time limit was "jurisdictional"); *E.W. Bliss Co.* v. *United States*, 53 Ct. Cl. 47, 65 (1917) (same, relying on Tucker Act ruling in *Wardwell*).[15] This Court had also applied the same jurisdictional rule to a statute that authorized the Seminole Nation to bring claims against the United States but declared any claim not brought within a

---

to be implied") (emphasis added); see also *Dalm*, 494 U.S. at 608 (citing cases for proposition that a "statute of limitations requiring that a suit against the Government be brought within a certain time period" restricts waiver of sovereign immunity and "define[s] the court's jurisdiction to entertain the suit") (citation omitted).

[15] Congress was well aware of these other statutes when it enacted the FTCA. See, *e.g.*, 1946 Senate Report 31; S. Rep. No. 1196, 77th Cong., 2d Sess., at 5 (1942) (noting that proposed bill would "extend to claimants against the Government for torts of negligence the same right to a day in court which claimants now enjoy in fields such as * * * patent infringement, or admiralty claims").

specified time period to be "forever barred." *United States* v. *Seminole Nation*, 299 U.S. 417, 419, 421-422 (1937) (citing *Finn* and tying jurisdictional holding to statute's waiver of sovereign immunity).

b. The FTCA time bar is likewise a condition on the waiver of sovereign immunity. This Court said so expressly in *United States* v. *Kubrick*, 444 U.S. 111 (1979), where it noted that the FTCA "waives the immunity of the United States" and emphasized that "in construing the statute of limitations, *which is a condition of that waiver*, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Id.* at 117-118 (emphasis added) (citing *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)).[18] Congress therefore would have expected courts to apply the FTCA time bar as a jurisdictional requirement—just as conditions on waivers of sovereign immunity had always been applied.

This Court's 1957 *Soriano* decision strongly supports that conclusion. The plaintiff in that case was a resident of the Philippines who sought compensation under the Tucker Act for the requisitioning of food and equipment during World War II. *Soriano*, 352 U.S. at 270-271. He filed his claim outside the six-year time limit set forth in 28 U.S.C. 2501, but argued that the time limit should have been tolled for the duration of the war. 352 U.S. at 272. This Court rejected the tolling request as inconsistent with Congress's intent

---

[18] See 1946 Senate Report 29 (explaining that FTCA waives sovereign immunity "with certain limitations"); *John R. Sand & Gravel*, 552 U.S. at 133 (recognizing that statutes of limitations "limit[] the scope of a governmental waiver of sovereign immunity").

to enact strict time limits on the scope of its waiver of sovereign immunity. *Id.* at 275-277.

Notably, the Court ranged beyond the Tucker Act context and directly addressed Congress's intent with respect to other claims, including tort claims. The government's brief had expressed concern that allowing equitable tolling of Tucker Act claims would logically imply the same result for claims under other statutes waiving sovereign immunity to suits against the United States, and it cited the FTCA as well as the Suits in Admiralty Act and the Act of 1910.[17] The Court shared that concern, which it emphasized in its opinion:

> To permit the application of the doctrine urged by petitioner *would impose the tolling of the statute in every time-limit-consent Act* passed by the Congress. For example, statutes permitting suits for tax refunds, *tort actions*, alien property litigation, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in *each statute* that the period of limitation was not to be extended by war.

Soriano, 352 U.S. at 275-276 (emphases added).

The Court accordingly rejected the argument that tolling was available under those statutes unless Congress expressly stated otherwise. *Soriano*, 352 U.S. at 274-276. It recognized that any other result would

---

[17] U.S. Supp. Br. at 41-45, *Soriano*, *supra* (No. 49) (noting that FTCA does not contain provision tolling time limit for legal disability and then arguing that "*[t]he rule of construction sought by petitioner would subject to indefinite extension every statute conferring a limited consent to sue the United States*").

be contrary to Congress's expectation that courts would strictly enforce statutory time limits when they are conditions on its waiver of sovereign immunity:

> *Congress was entitled to assume that the limitation period it prescribed meant just that period and no more.* With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.

Id. at 276 (emphasis added) (footnote omitted).

It may be that after *Irwin*, this Court would not, without more, apply *Soriano*'s categorical rationale to any new statute waiving immunity for claims against the United States. *Irwin*, 498 U.S. at 94-96; see *Holland* v. *Florida*, 560 U.S. 631, 646 (2010). But *Irwin* itself recognized that the availability of equitable tolling turns on a "realistic assessment of legislative intent." 498 U.S. at 95; see *John R. Sand & Gravel*, 552 U.S. at 137-138. And *Soriano* explained that when Congress passed the Tucker Act and then the subsequent tort statutes, it expected the statutory time limits for filing claims to carry jurisdictional consequences. In that era—and in that specific context—Congress did not expect its silence to be taken as implicit consent to equitable tolling. Because tolling is inconsistent with any "realistic assessment" of Congress's intent, *Irwin*, 498 U.S. at 95, it is not available under the FTCA.

3. *Other aspects of the FTCA's text and history confirm that Congress did not endorse equitable tolling*

Additional features of the FTCA's text and history confirm that the time bar is a jurisdictional condition not subject to equitable tolling.

a. The plain text of the FTCA time bar is significant, even apart from its obvious historical roots in the 1863 and 1911 Acts. That text is straightforward and direct: It declares that "[e]very" untimely claim "shall be forever barred," and it contains no exceptions, caveats, or ambiguities. The "unusually emphatic form" Congress used to establish the time bar supports treating it as a strict requirement not subject to equitable tolling. *Brockamp*, 519 U.S. at 349-354.

That same text, of course, also attaches a specific jurisdictional *consequence* to delayed filings, stating that untimely claims "shall be forever barred." 28 U.S.C. 2401(b). Unlike other statutes of limitations that simply authorize a claim to be brought within a specific period, the FTCA provision goes a step further by requiring dismissal of such claims. See generally Pet. App. 70a-80a (Bea, J. dissenting).[18] In com-

---

[18] See also *Irwin*, 498 U.S. at 94-95 (quoting 42 U.S.C. 2000e-16(c) (1988)) (within 30 days an employee "may file a civil action")). The *Irwin* Court recognized that "[a]n argument can undoubtedly be made" that the text of 28 U.S.C. 2501, providing that every untimely claim "shall be barred," is "more stringent" than the language in Section 2000e-16(c). 498 U.S. at 95. The Court was "not persuaded that the difference between them [wa]s enough to manifest a different congressional intent with respect to the availability of tolling." *Ibid.* This Court subsequently held in *John R. Sand & Gravel*, however, that the time bar in 25 U.S.C. 2501 is a jurisdictional limit not subject to waiver or tolling, and that *Irwin* had not overruled *Soriano*'s holding to that effect. 552 U.S. at 133-138.

manding that such claims "shall be forever barred," the provision speaks to—and restricts—the "adjudicatory authority" of courts. *Reed*, 559 U.S. at 160-161 (citation omitted) (noting that "[j]urisdictional statutes speak to the power of the court") (citation omitted).

Indeed, this Court, in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), recognized that the FTCA time bars constrain the authority of district courts. There, the Court identified Section 2401(b)'s "shall be forever barred" formulation as being "of a similar order" as a jurisdictional bankruptcy statute that "*confines review* [by the bankruptcy court] to 'matters to which any party has timely and specifically objected." *Id.* at 453 & n.8 (emphasis added). Significantly, the other statute *Kontrick* cited as being of a "similar order" to the bankruptcy statute that "confines review" to timely filings was 28 U.S.C. 2107, which this Court subsequently held in *Bowles* is jurisdictional and not subject to waiver or tolling. 540 U.S. at 453 n.8; see *Bowles*, 551 U.S. at 209-213.

b. The FTCA as originally enacted also expressly conditioned its grant of "exclusive jurisdiction" to district courts on the plaintiff's compliance with the time limitation for filing suit. FTCA § 410(a), 60 Stat. 843-844 (granting jurisdiction "[s]ubject to the provisions of this title"); FTCA § 420, 60 Stat. 845 ("this title" included the bar to filing after the statutory one-year period); see Pet. App. 53a-54a (Tashima, J., dissenting). That cross-reference confirms that the 1946

Because the operative language of the FTCA time bar was modeled on the virtually identical time bar applicable to Tucker Act claims, *Irwin* likewise does not affect the jurisdictional character of 28 U.S.C. 2401(b).

Congress understood the time bar as a direct limit on the district court's jurisdiction.[19]

c. Although the operative text of the FTCA time bar tracks the corresponding text of the 1863 and 1911 Acts, the FTCA does not include the express provisions in those Acts *allowing* tolling in cases where the plaintiff suffered under a legal disability at the time of suit. See pp. 3-5, *supra*. That difference between the otherwise-similar provisions shows that Congress did not want even a limited form of tolling to apply to FTCA cases. See *Lorillard* v. *Pons*, 434 U.S. 575, 581-582, 585 (1978) (holding that Congress's "selective incorporation" of some aspects of one statutory scheme into a new statute "strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully" the relevant aspects of the

---

[19] The court of appeals noted that Congress later separated the FTCA's jurisdiction-granting and time-bar provisions—and eliminated the cross-reference to the latter—when it recodified Title 28 in 1948. Pet. App. 26a-29a. But this Court has made clear that changes resulting from the 1948 recodification should not be given substantive significance in statutory interpretation. See, *e.g.*, *John R. Sand & Gravel*, 552 U.S. at 136; *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 225-226 (1957); see also 1948 Act § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed."); H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947) (noting that 1948 recodification "simplifies and restates" the existing FTCA time bars "without change of substance"). Indeed, Congress in 1948 likewise codified the time bar applicable to Tucker Act claims, 28 U.S.C. 2501, in a different chapter of Title 28 (Ch. 165) from the statutory provision conferring jurisdiction on the Court of Claims, 28 U.S.C. 1491 (Ch. 91). Yet the Court still held in *John R. Sand & Gravel*, 552 U.S. at 133-136, that the Tucker Act time limit is jurisdictional.

original statute); see generally Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174, 190-192, 220-228 (2000) (Colella & Bain).

The absence of any tolling provision was "a deliberate choice, rather than an inadvertent omission." *United States* v. *Muniz*, 374 U.S. 150, 156 (1963). During the decades-long process of drafting the FTCA, several of the proposed bills contained either a "reasonable cause" exception to the time bar, a savings provision that tolled the time for filing an action during periods of disability (such as infancy or mental incompetency), or both.[20] As this Court concluded in rejecting the argument that FTCA suits may not be brought by federal prisoners, the fact that any such exception is "absent from the [FTCA] itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon the language of the earlier bills." *Ibid.* Ordinarily, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intend-

---

[20] See S. 1043, 74th Cong., 1st Sess. §§ 1(c), 202(a) (1935); S. 1833, 73d Cong., 1st Sess. §§ 1(c), 202(a) (1933); S. 4567, 72d Cong., 1st Sess. §§ 1(c), 202(a) (1932); H.R. 16429, 71st Cong., 3d Sess. §§ 22, 34 (1931); H.R. 15428, 71st Cong., 3d Sess. §§ 202(a), 304 (1930); S. 4377, 71st Cong., 2d Sess. §§ 202(a), 304 (1930); H.R. 9285, 70th Cong., 1st Sess. §§ 202(a), 304 (1928); S. 1912, 69th Cong., 1st Sess. §§ 202(a), 304 (1926) (as reported by the House Comm. on Claims); H.R. 6716, 69th Cong., 1st Sess. §§ 202(c), 305 (1926); see generally Colella & Bain 190-192, 220-228 (describing proposed bills).

ed." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[21]

The legislative history also suggests that while Congress knew that the FTCA's strict time bar might be harsh in particular circumstances, it expected that claimants in such cases would seek enactment of a private law—not that courts would grant equitable tolling. For example, Judge Alexander Holtzoff—a "major figure[] in the development of the [FTCA]," *Kosak* v. *United States*, 465 U.S. 848, 856 (1984), who was then serving as a special assistant to the Attorney General—testified that "[i]f unusual cases of hardship arise, the claimant may still have recourse to a private bill, over which the claims committees would have jurisdiction." *Tort Claims Against the United States: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940).[22]

d. Finally, it is notable that in the period immediately following its enactment, the FTCA time bar was

---

[21] Over two decades later, the committee report on a bill proposing to add similar tolling provisions to Section 2401(b) suggested that the 1946 Congress omitted tolling in order "to allay the feelings of those who questioned the advisability of authorizing tort claims suits against the Government." H.R. Rep. No. 629, 91st Cong., 1st Sess. 3-4, 6 (1969).

[22] Accord *Tort Claims Against the United States: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 21 (1940) (statement of Alexander Holtzhoff); see also 69 Cong. Rec. 2200 (1928) (statements of Reps. Bankhead & Underhill) (reflecting understanding that time limit would be strictly enforced and that in "isolated cases" of "hardship" where the claimants could not "confer with counsel or make arrangements about the bringing of a suit" because they live far away or are "in hospital for 8 or 10 or 12 months," their remedy would be to "come back to Congress [for a private bill]"); see generally Colella & Bain 191-194.

generally not understood to permit equitable tolling. Thus in 1947, Judge Benjamin Moore described that time bar in remarks given to the Fourth Circuit Judicial Conference (and later published in the *American Bar Association Journal*) as "peculiar[]"—and unlike other federal and state statutes of limitation—insofar as it "contain[ed] no saving clause or provision which would toll the statute where infants, insane persons, or others under disability are concerned." *Federal Tort Claims Act: Useful Discussion at Fourth Circuit Conference*, 33 A.B.A. J. 857, 860 (1947). Judge Moore acknowledged that tolling would not be available in such circumstances, stating "I know of no modern rule of construction whereby [such tolling] can be implied, especially where the right exists only by force of a statute." *Ibid.* In a similar commentary, Judge Leon R. Yankwich noted that "there is no jurisdiction to entertain [an FTCA] action after the expiration of the period within which it might have been brought," that *Finn* and other cases establish that courts "interpreting statutes waiving governmental immunity" are "confined to the letter of the statute," and that no waiver of the FTCA limitations period is permissible. *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143, 153-154 (1949).

C. Events Following The FTCA's Enactment In 1946 Confirm That Section 2401(b) Is Jurisdictional And Not Subject To Equitable Tolling

As explained above, Congress did not intend the original 1946 version of the FTCA time bar to be subject to equitable tolling. That understanding has been confirmed over subsequent decades.

1. Congress addressed hardship cases by extending the suit-filing deadline in 1949

In 1949, Congress extended the suit-filing deadline to two years in order to prevent "unfair[ness]" in particular situations, such as when claimants "suffered injuries which did not fully develop until after the expiration of the period for making claim" or when a deceased tort victim's next of kin did not receive notice of the wrongful death within the statutory period. See H.R. Rep. No. 276, 81st Cong., 1st Sess. 3-4 (1949); S. Rep. No. 135, 81st Cong., 1st Sess. 2 (1949). The very enactment of the 1949 extension demonstrates that Congress retained, and was prepared to exercise, the authority to determine how to address possible hardships in the application of Section 2401(b)'s strict time limit.

Moreover, in the discussions leading up to the 1949 change, Representative John Gwynne briefly suggested the idea of addressing "hardship cases—where a person had a reasonable excuse for not observing the [time limit]"—by "amend[ing] the [FTCA] so the court might have some discretion" in applying the one-year statute of limitations. *To Extend the Time for Filing Claims Under the Federal Tort Claims Act: Hearings Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 80th Cong., 2d Sess. 27-28 (Mar. 10, 1948). A representative from the Justice Department dismissed that suggestion as not "practical." *Id.* at 28. Congress's decision to address possible instances of hardship by extending the time limit in the text of the statute itself underscores that Congress did not confer an extra-textual power to do so on the courts.

2. *Congress reenacted Section 2401(b) in 1966 against the backdrop of* Soriano *and of decisions holding the FTCA time bar to be jurisdictional*

In 1966, Congress revised the FTCA time bar by (1) requiring claimants to present their claims to the appropriate agency within two years, and (2) barring any suit not filed within six months of the agency's denial of the claim. 1966 Act §§ 2(a), 7, 80 Stat. 306, 307. In doing so, Congress also reenacted—without substantive amendment—the key operative language included in the original time limit. *Ibid.*; see 28 U.S.C. 2401(b) (providing that any untimely tort claim against the United States "shall be forever barred"). Three aspects of the 1966 legislation reinforce the conclusion that Congress understood the FTCA time bar to be jurisdictional and not subject to equitable tolling.

a. Congress enacted the 1966 revision of the FTCA against the backdrop of this Court's 1957 analysis in *Soriano*. As discussed above, *Soriano* held that Section 2501's virtually identical time bar must be strictly enforced without tolling. 352 U.S. at 275-276; pp. 32-34, *supra*. The Court explained—in language equally applicable to Sections 2501 and 2401(b)—that "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." 352 U.S. at 276. The Court further noted its longstanding precedent establishing "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Ibid.* *Soriano* thus once again assured Congress of the settled doctrine that a statutory time limit with respect to suits

against the government could not be tolled unless the statute said so expressly.

Congress also acted in 1966 against the backdrop of circuit and district court decisions uniformly holding the FTCA time limit to be a jurisdictional requirement not subject to waiver or tolling. For example, the Fifth Circuit had rejected equitable tolling of Section 2401(b) on the ground that the FTCA conditioned the government's waiver of sovereign immunity "upon the suit's being filed within the time fixed in the Act and not otherwise," thereby making "exact compliance with the terms of consent * * * a condition precedent to suit." *Simon* v. *United States*, 244 F.2d 703, 704 (1957); see *United States* v. *Croft-Mullins Elec. Co.*, 333 F.2d 772, 777 n.9 (5th Cir. 1964) (citing *Finn* and holding that "[s]ince the limitation was part of the statute creating the liability, the time is an indispensable condition of the liability, whether limitations are pleaded or not"), cert. denied, 379 U.S. 968 (1965).

Similarly, the Ninth Circuit had dismissed an FTCA case for lack of jurisdiction due to noncompliance with the time limit because "no waiver [of sovereign immunity] exists * * * once the two-year period of limitations has run." *Humphreys* v. *United States*, 272 F.2d 411, 412 (1959). And the Fourth Circuit had relied on this Court's interpretation of the Tucker Act time bar in *Munro* and *Finn* to hold that the FTCA time limit was not subject to waiver. *Anderegg* v. *United States*, 171 F.2d 127, 128 (1948) (per curiam), cert. denied, 336 U.S. 967 (1949).[23]

---

[23] See also *Lomax* v. *United States*, 155 F. Supp. 354, 357-359 (E.D. Pa. 1957) (citing *Finn* and holding that FTCA time bar is not subject to waiver and that "it is not within the power of * * * this Court * * * to make exceptions thereto"); *Foote* v. *Public Hous.*

This Court has often emphasized that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard*, 434 U.S. at 580-581.[24] That principle applies here. If Congress had disagreed with *Soriano* or the uniform construction of Section 2401(b) by the lower courts, it surely would have said so. By reenacting the operative language without change, Congress ratified the uniform view that the time limits are jurisdictional requirements not subject to equitable tolling.

b. The 1966 legislation was originally drafted by the Department of Justice and communicated to Congress by Attorney General Nicholas deB. Katzenbach. H.R. Rep. No. 1532, 89th Cong., 2d Sess. 10-15 (1966); S. Rep. No. 1327, 89th Cong., 2d Sess. 2-3, 9-13 (1966). At the time, the Department's longstanding position—including in its *Soriano* brief and other filings—was that Section 2401(b)'s time limit was a jurisdictional condition on the waiver of sovereign immunity and not subject to tolling.[25] The Department would not have

---

Comm'r of the U.S., 107 F. Supp. 270, 275-276 (W.D. Mich. 1952) (rejecting argument that tolling of Section 2401(b) time limit is available under express tolling provision in Section 2401(a)); *Whalen* v. *United States*, 107 F. Supp. 112, 113 (E.D. Pa. 1952) (same).

[24] See generally, *e.g.*, *Bragdon*, 524 U.S. at 645; *Cannon* v. *University of Chi.*, 441 U.S. 677, 696 (1979) (presuming that Congress was aware of circuit and district court interpretations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, when it enacted similar language in Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373)).

[25] See, *e.g.*, U.S. Supp. Br., at 41-45, *Soriano*, *supra* (No. 49); U.S. Br. in Opp. at 7, *Pittman* v. *United States*, 382 U.S. 941 (1965) (No.

urged Congress to reenact the operative language of Section 2401(b)'s time bar if it had understood such language to *permit* tolling.[26]

c. The 1966 Act was passed in tandem with a separate bill that created statutes of limitations for certain suits filed *by* the United States—and that expressly provided for tolling in particular circumstances. See Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304. Like the FTCA reenactment, that separate bill was also drafted by the Justice Department, and it was sent to Congress as part of the same communication from Attorney General Katzenbach. See H.R. Rep. No. 1534, 89th Cong., 2d Sess. 2-4, 7-8, 9-14 (1966). Congress considered the Justice Department's companion proposals "as a group," *id.* at 3, and it enacted the separate law on the same day that it amended the FTCA.

---

578) (relying on *Soriano* and arguing that Section 2401(b) was not subject to tolling due to claimant's legal disability); see also *Kington* v. *United States*, 265 F. Supp. 699, 701 (E.D. Tenn. 1967) (noting government's argument that Section 2401(b) deprived court of jurisdiction over untimely claim), aff'd, 396 F.2d 9 (6th Cir.), cert. denied, 393 U.S. 960 (1968).

[26] Three years later, the Department confirmed its understanding that the FTCA time bar did not allow tolling. In a letter to the House Judiciary Committee addressing a bill that would have allowed tolling when the claimant suffered under a legal disability, Deputy Attorney General Richard Kleindienst noted the Department's longstanding position "in opposition to the tolling of the statute of limitation in tort claims against the United States" and argued that "[n]o special circumstances have been indicated which suggest a need for tolling the statute, and there are many considerations which clearly indicate that it would be most undesirable to do so." H.R. Rep. No. 629, 91st Cong., 1st Sess. 5-6 (1969) (reprinting Kleindienst letter and confirming that this also reflected the position communicated to Congress in 1967).

The companion statute-of-limitations law is instructive because—in contrast to the 1966 FTCA amendment—it contained a list of "Exclusions" expressly authorizing tolling of the time limits applicable to government-initiated suits in specific circumstances. Act of July 18, 1966, Pub. L. No. 89-505, sec. 1, § 2416, 80 Stat. 305. Those circumstances included (1) the defendant's absence from the country, (2) the defendant's temporary exemption from legal process due to "infancy, mental incompetence, diplomatic immunity, or for any other reason," (3) the lack of actual and constructive knowledge of facts material to the right of action by responsible government officials, and (4) a state of declared war. *Ibid.*

That separate law thus shows that when Congress wanted to authorize tolling of a statutory time limit, it did so explicitly by statute. Congress's decision not to incorporate such provisions in the reenacted Section 2401(b) confirms that it did not want to permit tolling of the time bars.

3. Congress enacted numerous private laws "conferring jurisdiction" to hear FTCA claims "notwithstanding" Section 2401(b)

As explained above, Congress expected that claimants who failed to satisfy the FTCA's timing requirements could nonetheless pursue their claims by seeking private laws from Congress. See p. 39, *supra*. After 1946, Congress repeatedly enacted private laws granting individual claimants the right to bring their otherwise untimely tort claims in court. Many of those private laws used language expressly confirming that Section 2401(d)'s time limits are jurisdictional.

The operative language of private laws enacted to revive untimely FTCA claims from the early 1950s to the mid-1980s commonly provided as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, *notwithstanding the provisions of section 2401 (b)* of title 28, United States Code, *jurisdiction is hereby conferred* upon the United States District Court for [a given district] to hear, determine, and render judgment on the tort claims of [the claimant] against the United States on account of personal injuries sustained on [a given date, and under particular stated circumstances].

Priv. L. No. 85-176, 71 Stat. A66 (1957) (emphases omitted and added).[27]

The text of those private laws confirms that Congress consistently viewed Section 2401(b) as a condition on the exercise of jurisdiction, and not as a run-of-the-mill statute of limitations subject to equitable

---

[27] See, *e.g.*, Priv. L. No. 96-30, 93 Stat. 1401 (1979) (virtually identical language granting "jurisdiction" "notwithstanding the time limitation of Section 2401(b) of title 28, United States Code"); Priv. L. No. 96-29, 93 Stat. 1400 (1979) (same); Priv. L. No. 91-116, 84 Stat. 2113 (1970) ("conferr[ing]" "jurisdiction" "notwithstanding the limitations of section 2401 of title 28, United States Code"); Priv. L. No. 91-109, 84 Stat. 2110 (1970) (same); Priv. L. No. 90-284, 82 Stat. 1403 (1968) (same); Priv. L. No. 85-184, 71 Stat. A70 (1957) (same); see also Priv. L. No. 99-15, 100 Stat. 4319 (1986) (granting "jurisdiction" to district court under 28 U.S.C. 1346 to hear tort claim "notwithstanding the two-year limitation set forth in section 2401(b) of title 28, United States Code"); Priv. L. No. 71, 65 Stat. A28 (1951) (granting "jurisdiction" to district court under 28 U.S.C. 1346 "despite section 2401 of title 28, United States Code"); Priv. L. No. 64, 65 Stat. A26 (1951) (same).

tolling. If Section 2401(b) were nonjurisdictional, there would have been no reason for Congress to have "conferred" jurisdiction "*notwithstanding*" that provision.

Some of these private laws were enacted to revive claims that were jurisdictionally barred by Section 2401(b)'s deadline for filing suit in court, and others were enacted to revive claims barred by the deadline for presenting the claim to an agency.[28] Congress therefore plainly recognized that *both* time limits established jurisdictional limits on the power of district courts to adjudicate FTCA claims.

This Court has emphasized that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Loving* v. *United States*, 517 U.S. 748, 770 (1996) (brackets and citation omitted).[29] Here, the private laws enacted over a number of decades treating Section 2401(b) as jurisdictional provide strong confirmation

---

[28] For examples of private bills reviving claims barred by Section 2401(b)'s suit-filing deadline, see Priv. L. No. 91-109, 84 Stat. 2110 (1970); H.R. Rep. No. 58, 91st Cong., 1st Sess. 2-3 (1969); Priv. L. No. 90-284, 82 Stat. 1403 (1968); S. Rep. No. 376, 90th Cong., 1st Sess. 2-3 (1967). For examples of private bills reviving claims barred by the administrative-presentment deadline, see Priv. L. No. 96-30, 93 Stat. 1401 (1979); H.R. Rep. No. 460, 96th Cong., 1st Sess. 2 (1979); Priv. L. No. 96-29, 93 Stat. 1400 (1979); S. Rep. No. 461, 96th Cong., 1st Sess. 1-2 (1979).

[29] See, *e.g.*, *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3228 (2010) (noting that a later-enacted statute can "clarify the understanding" of prior legislation); *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (noting that statutory provisions should be "construe[d] [] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law"); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

that the FTCA time bar—as enacted in 1946, and as reenacted in 1966—does not permit equitable tolling.

4. Congress consistently rejected proposals to authorize equitable tolling

After 1946, Congress repeatedly declined to enact bills to permit tolling even in circumstances where the claimant was under various forms of legal disability, such as minority, insanity, imprisonment, or the like.[30] The history surrounding those proposed bills makes clear that Congress was well aware that Section 2401(b) did not permit equitable tolling in its existing form.

For example, the House Judiciary Committee report on a 1969 proposal emphasized (1) the contrast between the specific tolling provisions in Section 2401(a) and the absence of any such provision in Section 2401(b); (2) Congress's rejection of draft bills in the 1920s and 1930s that included tolling provisions; (3) two Ninth Circuit decisions rejecting the availability of tolling under Section 2401(b); and (4) the Justice Department's opposition to allowing the FTCA time bar to be tolled. H.R. Rep. No. 629, 91st Cong., 1st Sess. 3-4, 6 (1969). The report expressed the view that "the time is overdue for the recognition of the fact that persons suffering from legal disabilities * * * are actually being deprived of their rights because of the presently overstrict limitation provisions now found in [Section 2401(b)]." *Id.* at 4.

---

[30] See, H.R. 3261, 101st Cong., 1st Sess. (1989); H.R. 3260, 101st Cong., 1st Sess. (1989); H.R. 1023, 99th Cong., 2d Sess. (1986); H.R. 10575, 92d Cong., 1st Sess. (1971); H.R. 10124, 91st Cong., 1st Sess. (1969); H.R. 4155, 91st Cong., 1st Sess. (1969); H.R. 5713, 90th Cong., 1st Sess. (1967); H.R. 7184, 89th Cong., 1st Sess. (1965); H.R. 2403, 81st Cong., 1st Sess. (1949).

Years later, Deputy Assistant Attorney General Robert Willmore testified before Congress concerning a similar bill. He explained that the Department of Justice was "strongly opposed" to the bill, noting that similar tolling provisions had been proposed "on a number of occasions" in the past and that the Department had "consistently and repeatedly opposed such legislation." *Time Extension for Presenting Tort Claims to Persons Under Legal Disability: Hearing Before the Subcomm. on Administrative Law & Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 7 (1986).

Thus, like the private laws that treated Section 2401(b) as jurisdictional, the failed proposals to amend Section 2401(b) to provide for equitable tolling—and the Executive Branch's consistent opposition to such proposals—still further reinforce the conclusion that Section 2401(b) does not permit tolling.

5. Congress in 1988 provided a narrow exception to Section 2401(b)'s time bars in one specific circumstance

In 1988, Congress did enact a provision allowing a form of tolling in one specific circumstance that was then arising with some frequency in FTCA litigation. Before this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), lower courts had typically held that federal employees were absolutely immune from personal liability in state common-law tort actions arising from activities within the scope of their employment, thereby making the FTCA the only remedy in such circumstances. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988) (1988 House Report). But in many cases, claimants had sued private individuals in state court and only subsequently learned that the defend-

ants were federal employees at the time they committed the alleged tort. By then, the FTCA's two-year time limit for presenting a claim to an agency had often expired. Without equitable tolling, such claimants were left without a remedy. See generally Colella & Bain 202-203.

This Court's 1988 *Westfall* decision limited the scope of a federal employee's immunity to circumstances where the employee was performing a discretionary function. 484 U.S. at 299. Congress responded by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, which overturned the *Westfall* decision and made the FTCA the exclusive remedy for any torts allegedly committed by government employees within the scope of their employment. § 5, 102 Stat. 4564; 1988 House Report 4. The law also created a new procedure for (1) substituting the United States as the proper defendant in such cases and (2) granting the claimant 60 days in which to present an FTCA claim to the appropriate agency. Westfall Act § 6, 102 Stat. 4564; see 28 U.S.C. 2679(d)(2)-(4) and (5). Under the Westfall Act, if the agency denies the claim in those circumstances, the claimant may sue in court and his claim "shall be deemed to be timely presented under section 2401(b) of this title," but only if the claim "would have been timely had it been filed [with the agency] on the date the underlying civil action was commenced." 28 U.S.C. 2679(d)(5).

Congress's decision to grant tort claimants extra time in that limited scenario—but not in others—confirms its understanding that Section 2401(b) does *not* permit equitable tolling in other circumstances.

Indeed, Congress passed the 1988 law at a time when the courts of appeals had consistently characterized Section 2401(b) as jurisdictional and had attached jurisdictional consequences to untimely filings.[31] At no point since 1946 did Congress ever reject that established rule, which comports with the text, history, and purpose of Section 2401(b). See *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828 (relying on fact that Congress amended the relevant statute six times and left untouched a uniform judicial and administrative interpretation). This Court should enforce that rule here.

---

[31] See, *e.g.*, *Richman* v. *United States*, 709 F.2d 122, 124 (1st Cir. 1983); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Peterson* v. *United States*, 694 F.2d 943, 945 (3d Cir. 1982); *Childers* v. *United States*, 442 F.2d 1299, 1303 (4th Cir.), cert. denied, 404 U.S. 857 (1971); *Vernell* v. *USPS*, 819 F.2d 108, 111-112 (5th Cir. 1987); *Garrett* v. *United States*, 640 F.2d 24, 26 (6th Cir. 1981) (per curiam); *Charlton* v. *United States*, 743 F.2d 557, 558-559 (7th Cir. 1984) (per curiam); *Burns* v. *United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Anderberg* v. *United States*, 718 F.2d 976, 977 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984); *Maahs* v. *United States*, 840 F.2d 863, 866 n.4 (11th Cir. 1988); *Sexton* v. *United States*, 832 F.2d 629, 633 & n.4 (D.C. Cir. 1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
MARK B. STERN
ANNE MURPHY
ADAM C. JED
Attorneys

SEPTEMBER 2014

APPENDIX

1. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

2. 28 U.S.C. 2401 provides:

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

3. 28 U.S.C. 2501 provides:

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

4. 28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

5. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial peti-

tion the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

* * * * *

6. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)), provides:

SEC. 10. *And be it further enacted*, That every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided, further*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

7. Judicial Code, ch. 231, § 156, 36 Stat. 1139 (1911), provides:

SEC. 156. Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

8. Federal Tort Claims Act, ch. 753, Tit. IV, 60 Stat. 842 (1946), provides in pertinent part:

TITLE IV—FEDERAL TORT CLAIMS ACT

* * * * *

PART 3—SUITS ON TORT CLAIMS AGAINST THE UNITED STATES

JURISDICTION

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission

complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the

claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

* * * * *

PART 4—PROVISIONS COMMON TO PART 2 AND PART 3

ONE-YEAR STATUTE OF LIMITATIONS

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant

by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

* * * * *

9. Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304, provides in pertinent part:

* * * * *

§ 2416. Time for commencing actions brought by the United States—Exclusions

"For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

"(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

"(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

"(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

"(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States."

SEC. 2. The table of sections at the head of chapter 161 of title 28 of the United States Code is amended by adding at the end thereof the following items:

"2415. Time for commencing actions brought by the United States.

"2416. Time for commencing actions brought by the United States—Exclusions."

10. Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306, provides in pertinent part:

* * * * *

SEC. 2. (a) Subsection (a) of section 2675 of title 28, United States Code, is amended to read as follows:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this sub-section shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

(b) Subsection (b) of section 2675 of title 28, United States Code, is amended by deleting the first sentence thereof.

* * * * *

SEC. 7. Subsection (b) of section 2401 of title 28, United States Code, is amended to read as follows:

"(b) a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

* * * * *

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
NOV 4 - 2014
OFFICE OF THE CLERK

No. 13-1074

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KWAI FUN WONG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

TOM STEENSON
P.O. Box 820207
Portland, OR 97282
(971) 645-6625

BETH CREIGHTON
MICHAEL ROSE
CREIGHTON & ROSE, P.C.
500 Yamhill Plaza Building
Portland, OR 97204
(503) 221-1792

Counsel for Respondent

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

(1) Is the six-month limit for filing suit under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), jurisdictional?

(2) If the six-month limit for filing suit under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is not jurisdictional, is it subject to equitable tolling?

TABLE OF CONTENTS

	Page
Questions Presented	i
Statutes Involved	1
Statement	1
Summary of Argument	9
Argument	13
I. The Issues In This Case Are Governed by The Standard In *Irwin v. Department of Veterans Affairs*	13
II. The Section 2401(b) Statute of Limitations Is Not Jurisdictional	21
A. Statutes of Limitations Are Presumptively Non-Jurisdictional	21
B. The Text of Section 2401(b) Makes Clear That The Statute of Limitations Is Not Jurisdictional	25
C. Prior Decisions of This Court Do Not Hold That The Section 2401(b) Statute of Limitations Is Jurisdictional	44
III. The Section 2401(b) Statute of Limitations Is Subject To Equitable Tolling	47
Conclusion	55

TABLE OF CONTENTS – Continued

Page

Appendices

Statutes Involved.....1a

Federal Statutes Providing That Claims or Actions Not Filed Within the Limitations Period Shall Be "Forever Barred" 15a

TABLE OF AUTHORITIES

Page

CASES:

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) ....*passim*

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 4

Bowen v. City of New York, 476 U.S. 467 (1986)....*passim*

Bowles v. Russell, 551 U.S. 205 (2007) 44

De Arnaud v. United States, 151 U.S. 483 (1894) 35

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 14

FDIC v. Meyer, 510 U.S. 471 (1994) 39

Finn v. United States, 123 U.S. 227 (1887) .....*passim*

Gonzalez v. Thaler, 132 S.Ct. 641 (2012) .....*passim*

Hecht v. Malley, 265 U.S. 144 (1924) 36

Henderson v. Shinseki, 131 S.Ct. 1197 (2011).....*passim*

Holland v. Florida, 560 U.S. 631 (2010) 11, 27, 48

Honda v. Clerk, 386 U.S. 484 (1967) 24

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) ....*passim*

John R. Sand & Gravel Co. v. United States, 522 U.S. 130 (2008) 12, 44, 45, 46

Kendall v. United States, 107 U.S. 123 (1883) 13, 34

Kontrick v. Ryan, 540 U.S. 443 (2004) 24

TABLE OF AUTHORITIES – Continued

Page

Lozano v. Montoya Alvarez, 134 S.Ct. 1224 (2014).....47

Marley v. United States, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009).....8

Mathews v. Eldridge, 424 U.S. 319 (1976).....45

Munro v. United States, 303 U.S. 36 (1938).....20, 46

Reed Elsevier v. Muchnik, 559 U.S. 154 (2010)....*passim*

Russello v. United States, 464 U.S. 16 (1983).....42

Scarborough v. Principi, 541 U.S. 401 (2004).....18, 20, 24

Sebelius v. Auburn Regional Medical Center, 133 S.Ct. 817 (2013).....21, 23, 24, 29, 49

Soriano v. United States, 352 U.S. 270 (1957)....*passim*

Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998).....22, 23

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers, 558 U.S. 67 (2000).....23, 26, 29

United States v. Beggerly, 524 U.S. 38 (1998).....47, 48

United States v. Brockamp, 519 U.S. 347 (1997).....48, 49, 50

United States v. International Business Machines Corp., 517 U.S. 843 (1998).....46

United States v. Kubrick, 444 U.S. 111 (1979).....30

United States v. Mottaz, 476 U.S. 834 (1986).....30

United States v. New York, 160 U.S. 598 (1896).....35

TABLE OF AUTHORITIES – Continued

Page

United States v. Seminole Nation, 299 U.S. 417 (1937) 35

United States v. Wardwell, 172 U.S. 48 (1898) 35

Weinberger v. Salfi, 422 U.S. 749 (1975) 45

Westfall v. Erwin, 484 U.S. 292 (1988) 52, 53

Young v. United States, 535 U.S. 43 (2002) 17, 47, 48

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 26, 27, 38

STATUTES AND RULES:

28 U.S.C. § 1331 38

28 U.S.C. § 1338(a) 38

28 U.S.C. § 1346 25

28 U.S.C. § 1346(b) 40

28 U.S.C. § 1346(b)(1) ..... *passim*

28 U.S.C. § 1346(d) 39, 40

28 U.S.C. § 2342 27

28 U.S.C. § 2401(a) 32, 33

28 U.S.C. § 2401(b) ..... *passim*

28 U.S.C. § 2409a(f) 30

28 U.S.C. § 2415(a) 32

28 U.S.C. § 2415(b) 32

28 U.S.C. § 2416 52

28 U.S.C. § 2501 46

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2671 40

28 U.S.C. § 2674 ..... 41, 47, 48

28 U.S.C. § 2675(a) 4, 53

28 U.S.C. § 2679(d)(5) 53, 54

28 U.S.C. § 2680 40

28 U.S.C. § 2680(a) 40

28 U.S.C. § 2680(b) 40

42 U.S.C. § 405(g) 37, 46

42 U.S.C. § 2000e-16(c) 14, 30

29 C.F.R. § 301.2(b) 29

Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767 ..... 32, 33, 36, 43, 47

Act of March 3, 1887, ch. 359, 24 Stat. 505 ..... 32, 33

Act of March 11, 1911, ch. 231, § 24, 36 Stat. 1091-93 ..... 33, 36

Act of June 25, 1948, ch. 646, § 2501, 62 Stat. 976 33

Clayton Act 32

Equal Access to Justice Act 24

Fair Labor Standards Act 32

Federal Rules of Civil Procedure, Rule 8(c) 47

Federal Rules of Civil Procedure, Rule 15 8

Federal Tort Claims Act ..... *passim*

Internal Revenue Code 13, 49

TABLE OF AUTHORITIES – Continued

Page

Racketeer Influenced and Corrupt Organizations Act.....32

Railway Labor Act 26, 29

Social Security Act.....12, 36, 46

Title VII.....*passim*

Trading with the Enemy Act.....25

Tucker Act.....*passim*

Westfall Act.....52, 53, 54, 55

BRIEFS:

Brief Amicus Curiae National Treasury Employees Union in Support of Petitioner, No. 89-5867, 1990 WL 10013118.....30

Brief for the Petitioners, *Bowen v. City of New York*, 1985 WL 670035 .....14, 20, 37, 46

Brief for the Respondent, *Scarborough v. Principi*, 2003 WL 23138393 .....18, 20

Brief for the Respondents, *Irwin v. Veterans Administration*, 1990 WL 511300 .....14, 15

Brief for the United States and EEOC as Amicus Curiae, *Zipes v. Trans World Airlines*, 1981 WL 389623.....27

Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Reed Elsevier, Inc. v. Muchnick*, 2009 WL 1601031.....21, 38

TABLE OF AUTHORITIES – Continued

Page

Brief for the United States, *Young v. United States*, No. 00-1567, 2001 WL 1597747 ..... 18, 48

Brief for the United States as Amicus Curiae Supporting Petitioner, *Arbaugh v. Y & H Corp.*, 2005 WL 1811402 ..... 27, 38

Reply Brief for Petitioner, *Irwin v. Veterans Administration*, 1990 WL 10013122 15

Reply Brief for the Petitioners, *Bowen v. City of New York*, 1986 WL 728260 46

OTHER AUTHORITIES:

Eli Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. 1015 (1997) 54

H.R. Rep. 100-700 (1988) 53, 55

H.R. Rep. 81-276 (1949) 51

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief. App. 1a-14a.

STATEMENT

(1) Respondent Kwai Fun Wong is the spiritual leader of the Wu-Wei Tien Tao Association ("the Association"), the Matriarch of the Tao Heritage. She was born in Hong Kong and was a citizen of the United Kingdom at all relevant times herein.

More than 30 years ago, the then Patriarch of the Association, Wu-Wei Lao Zhu (respectfully called Qian Ren), came to the United States and began to organize local religious organizations, known as alters, in several American cities. Over time Wu-Wei Tien Tao Associations were established in a number of areas, including Oregon and California, as well as in Canada, Australia, Hong Kong and Taiwan. Wong became a Tien Tao minister in the mid-1980's while in Hong Kong. In July 1982, Wong entered the United States with a B-2 visitor visa. Later that year, the Immigration and Naturalization Service granted a petition by the California Tien Tao Association to classify Wong as a religious worker/minister. In 1992 and again in 1994, Wong filed applications for permanent resident status; those applications were not acted on by INS. In 1998 Qian Ren designated Wong to become the Tao Matriarch after his death. Pet.App. 247a.

Qian Ren died in March, 1999. As a minister of the Association and Qian Ren's spiritual successor, Wong was obligated to accompany his body back to Hong Kong and arrange for his funeral. Before departing the United States, however, Wong failed to obtain an advance parole document permitting her to re-enter the United States. Upon completion of her religious obligations, Wong promptly returned to the United States 18 days later. She presented herself to federal immigration authorities and candidly disclosed the emergency which had required her brief absence from the United States. The INS paroled Wong into the United States. Pet.App. 247a-48a. In April 1999, Wong filed an application for parole and her attorney filed a new application for permanent resident status. Pet.App. 248a-49a. Wong's attorney wrote to the INS explaining Wong's situation, and offered to provide them with additional information, including a meeting with Wong herself. Pet.App. 249a.

In the wake of those applications, but unbeknownst to Wong or her attorney, local INS officials held a series of meetings about her status, retrieved her earlier applications for permanent resident status, and summarily denied the applications. The INS issued a "Determination of Inadmissibility," and ordered her removal from the United States; the existence of that determination and order were not disclosed to Wong until after her arrest a month later. Pet.App. 249a-52a. On June 10, 1999, the INS sent to Wong an "Employment Authorization" notice, explaining that she could pick up her Employment

Authorization Document from the local INS office. That notice was a sham, and directly violated INS policy prohibiting the use of such subterfuges to lure individuals to an INS office for the purposes of arrest and deportation. When Wong went to the INS office as requested, she was summarily arrested. Pet.App. 252a-53a.

INS policies prohibit strip searching individuals such as Wong while in detention. According to the complaint, INS knew at the time that it was the practice in the local Multnomah County jails to strip search every inmate entering or being transferred to one of the county jails. Despite that knowledge, Wong was transferred by INS to the Multnomah County jail system, where she was twice subjected to strip searches and body cavity searches. During both searches there were male guards in the room, separated from Wong by only a piece of fabric curtain. Pet.App. 256a-58a. Before Wong was taken to the Multnomah County jail, another Association official explained to the INS that Wong was a vegetarian, and that her religious vows forbad her to eat meat or animal products of any kind. For reasons that remain unclear, Federal officials did not take effective action to assure that jail officials would provide Wong with food that she could eat, and she never received a vegan meal. Wong contends that jail officials offered her "nothing I could eat" because "it all contained eggs, milk and animal product." Pet.App. 254a-56a. Within a few days Wong was transferred back to INS

custody and removed from the United States on a flight to Hong Kong. Pet.App. 258a.

The detention, strip searches and deportation of Wong had severe consequences for the Wu-Wei Tien Tao Association. In light of the manner in which federal officials had treated her, Association followers began to question Wong's authority and spiritual standing. There was an ensuing split in the religion and its organizations, and a decline in its membership and donations. Wong has remained outside the United States.

(2) On May 18, 2001, Wong presented a claim under the Federal Tort Claims Act (FTCA) to the INS. Pet.App. 5a, 110a-11a; J.A. 25-26. The claim included an allegation that federal officials had been negligent in connection with the conditions of Wong's confinement. That same day, Wong filed in federal court an action against several individual federal officials under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages based on her removal and the conditions of her detention. Pet.App. 5a, 110a-11a, 131a. Wong subsequently amended that complaint adding contentions not relevant here.

Under the terms of the FTCA, in the absence of a final agency decision on her administrative claim, Wong could not initiate a civil action against the United States until November 20, 2001, six months after the date on which she had submitted that claim. 28 U.S.C. § 2675(a). On November 9 and 14, 2001,

anticipating that impending date, counsel for Wong filed a motion for leave to amend her pending complaint, seeking to add a claim under the FTCA.[1] Pet.App. 5a-6a, 111a-12a; J.A. 8-9, 60-77. Wong filed with both of those motions a copy of her proposed second amended complaint. J.A. 63-77. The United States filed its response to these motions on November 30, 2001; by that point the six-month exhaustion period had been satisfied, and under the terms of the FTCA Wong was entitled to proceed in federal court. The government nonetheless objected to the motion, insisting that to proceed under the FTCA, Wong was required to file a second lawsuit. J.A. 78-83. On December 3, 2001, the INS issued a final denial of Wong's administrative complaint. Pet.App. 6a; J.A. 85-87. Respondent thus had six months, until June 3, 2002, to "beg[i]n" an "action" under the FTCA. 28 U.S.C. § 2401(b).

Wong continued to pursue her effort to amend her pending complaint. On December 10, 2001, Wong filed a Reply Memorandum in support of her motion for leave to amend. J.A. 10, 88-93. On December 17, 2001, the magistrate judge held a hearing on that and other pending motions. On April 5, 2002, the

---

[1] On November 14, the same day on which Wong filed a second motion for leave to amend, the district court granted her first motion. J.A. 8. Because the government had not responded to the first motion, but did reply to the second, the district court disregarded its November 14 order and treated the motion as pending and unresolved. See Doc. 53-1.

magistrate judge issued Findings and Recommendations, recommending that Wong be granted leave to file the proposed second amended complaint. Pet.App. 130a, 182a-85a. The magistrate judge's order also addressed a number of other pending motions. On April 26, 2002, the United States filed objections to some portions of the magistrate judge's recommendations; it did not, however, object to the recommendation regarding the second amended complaint. See Pet.App. 115a-17a. On June 25, 2003, the district judge adopted the magistrate judge's Findings and Recommendations, including the then unopposed motion for leave to file the second amended complaint. Pet.App. 128a-29a. The date of the district court's decision, however, was issued 22 days after the expiration of the six-month period to "beg[i]n" an action. On August 13, 2002, Wong filed a second amended complaint setting forth the FTCA allegations that had been contained in the amended complaints she had filed with her earlier motions of November 9 and November 14, 2001. J.A. 16.

After an interlocutory appeal on unrelated issues, the United States moved for summary judgment on Wong's FTCA claim in October 2005. The government argued that the district court lacked jurisdiction over the claim because it was not timely filed under 28 U.S.C. § 2401(b). The United States argued that Wong's motions (and amended complaints) filed on November 9 and 14, 2001, were filed 11 and 6 days too soon under the FTCA, and that her amended complaint of August 2002 was filed too late. Pet.App.

17a. The magistrate judge recommended denial of the government's motion, Pet.App. 112a-17a, and the district court adopted her findings and recommendation. Pet.App. 106a-07a. The judge stressed that "the government was not faced with the presentation of stale claims and has made no showing of any prejudice whatsoever. To the contrary, the government was fully apprised of plaintiffs' claims by their administrative filing, [and] had full notice of plaintiffs' intended FTCA claim just prior to the expiration of the six-month administrative review period...." Pet.App. 114a. "The government had notice of the intended FTCA claims with the filing of the motions to amend and now simply seeks to gain an unwarranted advantage." Pet.App. 117a. The judge explained that the plaintiffs had "appropriately waited" until a final ruling on the recommendations of the magistrate judge, and that final approval by the court of the motion for leave to amend had been delayed only because the government had appealed other recommendations. "Accepting the position of the government on this issue would effectively impose on plaintiffs a court-created Catch-22 and make a mockery of this court's prior ruling allowing the filing of the FTCA claim in this action, while doing nothing to serve the intended purpose of the statute of limitations in preventing the assertion of stale claims." Pet.App. 115a. The court thus tolled the six-month limitations period for 81 days, the time between the date the magistrate judge had recommended that Wong be granted leave to amend and the date the district court granted such leave. Pet.App. 117a.

Several years later, while the case was still pending in the district court, the United States moved for reconsideration based on the Ninth Circuit's intervening decision in *Marley v. United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). Pet.App. 103a-05a. *Marley* held that Section 2401(b)'s six-month statute of limitations cannot be equitably tolled because the statutory deadlines for FTCA claims are jurisdictional. 567 F.3d at 1033-38. The district court granted the motion, holding that it lacked jurisdiction over Wong's FTCA claim. Pet.App. 103a-05a.

Wong appealed, arguing inter alia that her August 2002 amended complaint was timely under the relation-back provision of Rule 15 of the Federal Rules of Civil Procedure.[2] After oral argument, the court of appeals invited the parties to submit supplemental briefs regarding whether the case should be reheard en banc. J.A. 2. The court of appeals subsequently ordered rehearing en banc. J.A. 3.

A divided en banc panel reversed, holding that the FTCA's six-month statute of limitations is not jurisdictional, Pet.App. 4a-36a, and that equitable tolling is permitted under section 2401(b). Pet.App. 36a-40a. The majority concluded that equitable tolling was appropriate under the circumstances of

---

[2] Plaintiffs-Appellants Brief, pp. 31-33.

this case. Pet.App. 46a-47a. The panel did not reach two alternative possible grounds for reversal.[3]

Judge Kozinzki concurred in the judgment. Pet.App. 48a-52a. He agreed with the dissenters that Section 2401(b) is jurisdictional, but concluded that Wong's December 10, 2001 Reply Memorandum should be treated as having "begun" her FTCA action within the six-month limitation period. Pet.App. 50a. Judges Tashima and Bea dissented in separate opinions, both of which concluded that the FTCA statute of limitations is jurisdictional. App. 52a-102a.

SUMMARY OF ARGUMENT

A. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), governs disputes about equitable tolling of statutes of limitations applicable to claims against the United States. Prior to *Irwin*, this Court had issued conflicting decisions regarding whether such limitations periods could be tolled. *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. That rule precludes the

[3] The court did not decide whether Wong's December 10, 2001, Reply Memorandum, filed *after* the expiration of the minimum six-month exhaustion period, could constitute "beg[i]n[ing]" an action, or whether the August 2002 second amended complaint was timely because of the relation-back provision of Rule 15. App. 44a.

government from objecting to tolling on the ground that statutes of limitations governing claims against the government are inherently jurisdictional; such an objection would invariably defeat the *Irwin* presumption. The government is free to argue that such a statute of limitations is jurisdictional, but only on grounds that could also be asserted by a private defendant.

The rule in *Irwin* should not be limited to statutes that were enacted after that 1990 decision. *Irwin* announced a principle of statutory construction, and application of such standards is not subject to such temporal restrictions. Doing so in this instance would largely codify the very drive-by jurisdictional rulings which this Court has properly sought to correct.

B. Statutes of limitations are presumptively non-jurisdictional. In a series of decisions dating from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), this Court has held that statutory requirements will be held jurisdictional only if Congress has clearly so stated. That clear statement requirement has particular force with regard to statutes of limitations, which are "quintessential claim-processing rules." *Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011).

C. The text of the Federal Tort Claim Act makes clear that the statute of limitations in section 2401(b) is not jurisdictional. The section 2401(b) statute of limitations is in a different section, and chapter, than the jurisdictional provision in section 1346(b)(1). The limitations provision in section 2401(b) does not refer

to or purport to limit the jurisdictional grant in section 1346(b)(1), and the jurisdictional provision does not refer to the statute of limitations.

The language of section 2401(b) "reads like an ordinary, run-of-the-mill statute of limitations." *Holland v. Florida*, 560 U.S. 631, 647 (2010). There is nothing exceptional about the terms of section 2401(b) stating that untimely claims shall be "forever barred." Every statute of limitations would be described as creating a "bar" to untimely claims. And the bar created by a statute of limitations is intended to be permanent.

This Court's Tucker Act decisions did not interpret the phrase "forever barred" to denote a jurisdictional statute of limitations. That phrase was not actually part of the 1887 Tucker Act, and is not in the Tucker Act today. Although the phrase was in the 1863 predecessor of the Tucker Act, and in the Tucker Act itself between 1911 and 1948, the decisions holding the variously worded statutes of limitations jurisdictional never turned on the language of that provision. Rather, in decisions such as *Finn v. United States*, 123 U.S. 227 (1887), the Court held that any statute of limitations applicable to a claim against the United States, however worded, would be jurisdictional because compliance with that statute of limitations is a condition of the United States consent to being sued. That was the interpretation of *Finn* advanced by the Solicitor General in *Bowen v. City of New York*, 476 U.S. 467 (1986).

D. Section 1346(b)(1) spells out six requirements which must be established to create jurisdiction over a tort claim against the United States. Where those elements are present, "the district court ... shall have ... jurisdiction." This mandatory language precludes reading into section 2401(b) any unspoken additional requirement. Doing so would be particularly inappropriate because other provisions, unlike section 2401(b), do expressly apply to and limit the scope of section 1346(b)(1).

E. The rules in *Irwin* and *Arbaugh* do not apply where this Court has consistently and deliberately held that a particular provision is jurisdictional. *John R. Sand & Gravel Co. v. United States*, 522 U.S. 130 (2008). But that exception does not apply in this case. No opinion of this Court ever decided that section 2401(b) of the Federal Tort Claims Act is jurisdictional. This Court's Tucker Act decisions did not establish a uniform rule that all statutes of limitations affecting actions against the United States are inherently jurisdictional; this Court's decisions under Title VII and the Social Security Act applied the opposite rule.

F. Limitations periods are presumptively subject to equitable tolling. There is nothing about the tort claims covered by the Federal Tort Claims act that militates against application of that usual rule. Those claims have none of the features that led this Court to hold that equitable tolling is unavailable under other statutes. The six-month filing period is not unusually long, case-by-case application of equitable tolling is normal, and tolling in this context

does not portend any of the practical problems of tolling claims under the Internal Revenue Code or in quiet title actions.

ARGUMENT

I. THE ISSUES IN THIS CASE ARE GOVERNED BY THE STANDARD IN *IRWIN v. DEPARTMENT OF VETERANS AFFAIRS*

For almost a quarter century, litigation about the availability of equitable tolling in actions against the United States have been governed by this Court's pivotal decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). *Irwin* significantly informs and to some degree limits the issues the Court must address in resolving the questions presented in this case.

Prior to *Irwin*, the decisions of this Court had taken conflicting approaches to equitable tolling in actions against the United States. *Soriano v. United States*, 352 U.S. 270 (1957), held in the context of a claim under the Tucker Act that "Congress ... gave the Government's consent to be sued [under the Tucker Act] only in certain classes of claims and that no others might be asserted against it, including 'claims which are barred if not asserted within the time limited by statute.'" 352 U.S. at 273 (quoting *Kendall v. United States*, 107 U.S. 123, 125 (1883)). Both before and after *Soriano*, the United States contended that all statutes of limitations regarding actions against

the government were jurisdictional, and thus precluded equitable tolling. In the years following *Soriano*, however, the Court repeatedly held that the statute of limitations applicable to Social Security claims was not jurisdictional, and could thus be tolled. Those decisions culminated in *Bowen v. City of New York*, 476 U.S. 467, 478 and n.10 (1986), where the government unsuccessfully urged the Court to apply the different approach in *Soriano*.[4]

The question in *Irwin* was whether the 30-day period for commencing a Title VII action against the United States is subject to equitable tolling. 42 U.S.C. § 2000e-16(c). The government insisted that the 30-day statute of limitations was jurisdictional,[5] relying

---

[4] Brief for the Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *43 ("The conclusion that [the 60-day filing deadline] should be ... construed [as jurisdictional] is reinforced by the fact that ... other statutory limitations on bringing suit against the government uniformly have been understood to be conditions on the waiver of sovereign immunity and therefore jurisdictional prerequisites to suit.... *Soriano v. United States.*"), *44, *46.

[5] Brief for the Respondents, *Irwin v. Veterans Administration*, available at 1990 WL 511300 at *6 ("Statutory time limits on suits against the government limit the sovereign's consent to be sued and, hence, define the court's jurisdiction."), *8 ("Compliance with the thirty-day limit is ... a 'jurisdictional prerequisite' for judicial review of federal employment discrimination claims." (quoting *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 137 (1981) (Brennan, J., concurring in judgment))), *10 ("time limitations specified by Congress are conditions of the sovereign's consent to suit. As such, they define the extent of the court's jurisdiction...."), *19 ("because the statutory deadline ... constitutes one of the terms of the sovereign's consent to be sued and,

(Continued on following page)

on *Soriano*.[6] The rule established by *Soriano*, it argued, was that in actions against the United States courts may not "apply[] equitable principles that, in the private contest, might justify the waiver or tolling of statutes of limitations."[7] The plaintiff, on the other hand, relied on *Bowen*.[8] This Court, citing *Bowen* and *Soriano*, acknowledged that "our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent." 498 U.S. at 456.

The Court concluded that the point had come to resolve the inconsistencies.

> [A] continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the

---

as such defines the district court's jurisdiction, ... the timely filing requirement ... is a jurisdictional prerequisite to district court consideration of a government employee's Title VII complaint.").

[6] *Id.* at *10 ("Time limitations specified by Congress are conditions of the sovereign's consent to suit. As such, they define the extent of the court's jurisdiction and, accordingly, must be strictly observed."), *14.

[7] *Id.* at *14.

[8] Reply Brief for Petitioner, *Irwin v. Veterans Administration*, available at 1990 WL 10013122 at 3-7, 13.

> applicability of equitable tolling in suits against the Government.

498 U.S. at 95. "We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96.

> Once Congress has made ... a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

498 U.S. at 95. That "general rule" was dispositive in *Irwin*. The Court had previously held that statutory time limits applicable to lawsuit against private employers under Title VII are subject to equitable tolling. 498 U.S. at 95 and n.2. Irwin's claim was thus subject to "the equitable tolling doctrine [that was applied] as between private litigants." 498 U.S. at 96.

Irwin governs the questions that a court must decide when a plaintiff seeks to invoke equitable tolling in an action against the United States. The rule in *Irwin* was necessarily a rejection of the government's argument in that case that statutes of limitations are jurisdictional – and thus bar equitable tolling – whenever they concern a claim against the government itself. The "rule" in *Irwin*

would be meaningless if it could be overcome by that argument, which would defeat the *Irwin* presumption in every case in which the United States is a defendant. Continued judicial consideration of such sovereign-immunity-based contentions in tolling disputes would also be incompatible with the intent of *Irwin* to end the pattern of "ad hoc" case-by-case decisions regarding when claims tolling issues regarding the United States should be accorded different treatment than tolling issues regarding private defendants. The government is free to contend that other types of provisions should be deemed jurisdictional simply because they are conditions of a waiver of sovereign immunity, but *Irwin* precludes that type of government-only contention regarding a statute of limitations. And while the government may argue that a statute of limitations is jurisdictional, it may do so only by advancing the "same" types of contentions regarding text or other considerations that could be asserted by a private litigant.

In *Young v. United States*, 535 U.S. 43 (2002), where the United States as a plaintiff sought to invoke equitable tolling, it correctly recognized the significance of *Irwin*.

> [T]his Court has held that time limits in federal statutes for filing claims are presumptively subject to equitable tolling.... So venerable is the practice that even waivers of sovereign immunity are presumed to incorporate the practice. *Irwin*, 498 U.S. at 95. That is because the assumption that Congress intended equitable tolling to be available in a

> statute "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation" of statutes. *Ibid.*

Brief for the United States, *Young v. United States*, available at 2001 WL 1597747 at *33-*34. "The *Irwin* decision rests on this Court's determination that, when Congress waives sovereign immunity from suit, it generally intends that the government will be treated like a private litigant in the application of equitable tolling principles." Brief for the Respondent, *Scarborough v. Principi*, available at 2003 WL 23138393 at *39. Private litigants, of course, may not defeat equitable tolling by arguing that they have not consented to be sued after a given period of time.

In this case, however, the United States advances the very argument necessarily rejected in *Irwin*, that statutes of limitations in statutes authorizing claims against the United States are inherently jurisdictional, and thus incompatible with equitable tolling, because those limitations are a condition of the government's consent to being sued. Pet. Br. 32-35. The government's "categorical" *Soriano*-based argument, Pet. Br. 34, reprises the very contentions that the Solicitor General made, and that this Court rejected, in *Irwin* and *Bowen*. See nn.4-6, *supra*. The United States advances no compelling reason to abandon the principle of statutory interpretation that has prevailed for the decades since *Irwin*. See *Scarborough v. Principi*, 541 U.S. 401, 419-23 (2004) (applying *Irwin*). In announcing the rule in *Irwin*, this Court observed that "Congress, of course, may

provide otherwise if it wishes to do so." 498 U.S. at 96. Congress, however, has not chosen to do so, and there is no reason for this Court to revisit the issues resolved by *Irwin* or to reconsider the correctness of the decision in *Bowen*.

The government appears to suggest that, if this Court is unwilling to abandon *Irwin*, it should at least limit the application of that decision to statutes adopted after December 3, 1990, the date on which *Irwin* was decided. "It may be that after *Irwin*, this Court would not, without more, apply *Soriano*'s categorical rationale to any *new* statute waiving immunity for claims against the United States." Pet. Br. 34 (emphasis added). "In th[e] era [prior to *Irwin*] ... Congress did not expect its silence to be taken as implicit consent to equitable tolling." *Ibid.*; see *id.* at 29-30. But this Court has not applied rules of statutory construction on such a date-specific basis, and it should not do so here. *Irwin* itself necessarily rejected this approach; the Title VII provision at issue had been adopted 18 years prior to the decision in *Irwin*. Justice White specifically (and unsuccessfully) objected that the relevant Title VII section "was enacted in 1972 when the presumption was, as set forth in *Soriano*....., that statutes of limitations for suits against the Government were *not* subject to equitable tolling." 498 U.S. at 100 n.2 (dissenting opinion). The majority in *Irwin* concluded, to the contrary, that the rule it adopted was "likely to be a realistic assessment of legislative intent." 498 U.S. at 95. The Court also rejected this argument when it was advanced by

the United States in *Scarborough v. Principi*, 541 U.S. 401, 420-23 (2004),[9] and in *Bowen*.[10]

The task of interpreting statutes would become immeasurably more difficult if courts were required to determine which principles of statutory interpretation were prevalent when each statute, or portion thereof, was adopted or amended. Doing so in this area of the law would actually codify past drive-by jurisdictional rulings as the standards of construction

---

[9] Brief for the Respondent, *Scarborough v. Principi*, available at 2003 WL 23138393 at *41 ("Congress drafted Section 2412(d) at a time, before *Irwin*, when the background presumption was that statutes of limitations in suits against the government were not subject to equitable tolling. See *Irwin*, 498 U.S. at 99 n.2 (White, J., concurring in part and in the judgment).").

[10] In its brief in *Bowen*, the government argued that decisions by this Court prior to the enactment of the provision at issue had held that statutes of limitations in laws authorizing suit against the United States were jurisdictional. Brief for the Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *41-*45.

> In 1938 the Court applied the same rule [in] ... *Munro v. United States*, 303 U.S. 36, 41 (1938). It was against this background that Congress in 1939 enacted Section 405(g) and thereby waived the government's immunity to suits arising under the Social Security Act. Because *Munro* had been decided only a year earlier ... , it is reasonable to assume that congress likewise intended the 60-day filing requirement in Section 405(g) to state a jurisdictional limitation.

Id. at *43.

controlling the meaning of all statutes adopted prior to the early years of the twenty-first century.[11]

II. THE SECTION 2401(b) STATUTE OF LIMITATIONS IS NOT JURISDICTIONAL

A. Statutes of Limitations Are Presumptively Non-Jurisdictional

Because a statutory requirement that is jurisdictional imposes special burdens on the courts and the parties, this Court has insisted that Congress must clearly indicate that a provision be treated as jurisdictional. "Characterizing a rule as jurisdictional renders it unique in our adversarial system. Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy. Tardy objections can therefore result in a waste of adjudicatory resources and disturbingly disarm litigants." *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, 824 (2013).

---

[11] See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Reed Elsevier, Inc. v. Muchnick*, available at 2009 WL 1601031 at *19 n.9 ("The court of appeals based its ... decision primarily on decisions predating *Arbaugh* that characterize Section 411(a) in jurisdictional terms.... These 'drive-by jurisdictional rulings,' ... should be given little weight because they predate *Arbaugh* and did not apply the analytic approach that his Court articulated in that case." (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006))).

> Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system.... [F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.

Henderson v. Shinseki, 131 S.Ct. 1197, 1202 (2011). "Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety.... Courts, we have said, should not lightly attach those 'drastic' consequences to limits Congress has enacted." *Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012) (quoting *Henderson*, 131 S.Ct. at 1202).

"'Jurisdiction,' this Court has observed, 'is a word of man, too many, meanings.' ... This Court, no less than other courts, has sometimes been profligate in its use of the term.... We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90, 91 (1998)).

> Courts – including this Court – have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis.... Our recent cases evince a marked desire to curtail such "drive-by jurisdictional rulings," ....

Reed Elsevier v. Muchnik, 559 U.S. 154, 161 (2010) (quoting *Arbaugh*, 546 U.S. at 511-12). "Recognizing that the word 'jurisdiction' has been used by courts, including this Court, to convey 'many, too many meanings,' ... we have cautioned, in recent decisions, against profligate use of the term." *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 81 (2000) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998)).

"To ward off profligate use of the term 'jurisdiction,' [the Court has] adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional.... We inquire whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, we have cautioned, 'courts should treat the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Center*, 133 S.Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)).

> Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline

> to the use of this term.... Under *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.' ... This approach is suited to capture Congress' likely intent and also provides helpful guidance for courts and litigants....

Henderson, 131 S.Ct. at 1203 (quoting *Arbaugh*, 546 U.S. at 515-16). Courts must ascertain that "Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement ... 'courts should treat the restriction as nonjurisdictional in character.'" *Henderson*, 131 S.Ct. at 1203 (quoting *Arbaugh*, 546 U.S. at 515-16); see *Gonzalez*, 132 S.Ct. at 648-9 ("clear-statement principle"); *Reed Elsevier*, 559 U.S. at 163 ("clearly states").

"Among the types of rules that should *not* be described as jurisdictional are what we have called 'claim-processing rules.' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain times.... Filing deadlines ... are quintessential claim-processing rules." *Henderson*, 131 S.Ct. at 1203 (emphasis added). "[W]e have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as 'quintessential claim-processing rules.'" *Sebelius*, 133 S.Ct. at 825 (quoting *Henderson*, 131 S.Ct. at 1203).[12] Thus only a

---

[12] See *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (filing deadline for fee applications under Equal Access to Justice Act); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (filing deadlines for objecting to debtor's discharge in bankruptcy); *Honda v.*

(Continued on following page)

particularly compelling showing would be sufficient to demonstrate that a filing deadline is jurisdictional.

B. The Text of Section 2401(b) Makes Clear That The Statute of Limitations Is Not Jurisdictional

The text of sections 2401(b) and 1346, and the statutory context, make clear that the limitations period in section 2401(b) is not jurisdictional.

(1) The clear distinction between the jurisdiction conferred on district courts by the Federal Tort Claims Act ("FTCA"), and the FTCA's statute of limitations, is reflected in the fact that those provisions are, and always have been, in different sections of the law. The jurisdictional element of the statute is set out in section 1346, which specifies a number of distinct requirements that must be met for jurisdiction to exist. Section 1346 is located in chapter 85 of Title 28, "District Courts; Jurisdiction." The statute of limitations, on the other hand, is set out in section 2401(b), which is headed "Time for Commencing Action Against United States," and is located in chapter 161 of Title 28, "United States as Defendant." The FTCA jurisdiction provision contains no reference to the statute's limitations provision. See Pet.App. 24a ("[W]hile § 1346(b)(1) does cross-reference 'the provisions of chapter 171,' it does *not* cross reference

---

Clerk, 386 U.S. 484, 498 (1967) (filing deadline for claims under Trading with the Enemy Act).

§ 2401(b), which is located in chapter 161, not 171.") (emphasis in original); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("The provision granting district courts jurisdiction ... contains no reference to the timely-filing requirement.") (footnote omitted). And the FTCA statute of limitations does not refer to the jurisdictional provision.

This Court has repeatedly explained that the separation of jurisdictional provisions from other requirements, such as statutes of limitations, is persuasive evidence that those other requirements are not jurisdictional.[13] The United States itself has pointed out the significance of a statutory scheme

---

[13] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) ("the provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."); *Reed Elsevier*, 559 U.S. at 164 ("§ 411(a)'s registration requirement is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [the] claims."); *Arbaugh*, 546 U.S. at 515)"the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'") (quoting *Zipes*, 455 U.S. at 394); *Union Pacific Railroad*, 558 U.S. at 83 ("the conference requirement is stated in the '[g]eneral duties' section of the [Railway Labor Act], § 152, a section that is not moored to the '[e]stablishment[,] ... powers[,] and duties' of the [National Railroad Adjustment Board], set out next in § 153."); *Gonzalez*, 132 S.Ct. at 651 ("Congress set off the requirements in distinct paragraphs....").

which separates jurisdictional provisions from other requirements.[14]

(2) The language of section 2401(b) "reads like an ordinary, run-of-the-mill statute of limitations." *Holland v. Florida*, 560 U.S. 631, 647 (2010). The section "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [court]." *Henderson*, 131 S.Ct. at 1204 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)); see *Arbaugh*, 546 U.S. at 515. "If Congress had wanted the [six-month] time to be treated as jurisdictional, it could have cast that provision in [jurisdictional] language...." *Henderson*, 131 S.Ct. at 1204-05; see *Gonzalez*, 132 S.Ct. at 649; 28 U.S.C. § 2342 ("Jurisdiction

---

[14] Brief for the United States as Amicus Curiae Supporting Petitioner, *Arbaugh v. Y & H Corp.*, available at 2005 WL 1811402, at *6-*7 ("the definition of 'employer' is structurally separate from the jurisdictional provision, which makes no reference to that definition."); Brief for the United States and EEOC as Amicus Curiae, *Zipes v. Trans World Airlines*, available at 1981 WL 389623, at *12 ("[The jurisdictional provision] is separate and distinct from the charge-filing section, ... contains no reference to the charge-filing requirement, and ... certainly does not purport to limit the jurisdiction of the federal courts to cases in which the plaintiff has complied with the charge-filing period. Neither does the charge-filing section purport to condition the jurisdiction of the federal courts upon compliance with this requirement. The two sections plainly deal with different subject matters and different purposes. While one deals with the jurisdiction of the federal courts, the other deals with proceedings before the Commission.... [There is no] evidence that Congress intended to merge the charge-filing requirement into the jurisdictional provision.... [I]f that had been Congress' intention, it could easily have been accomplished.") (footnote omitted).

is invoked by filing a petition as provided by section 2344 of this title."). Like the requirement in *Reed Elsevier*, the statute of limitations "is not located in a jurisdiction-granting provision...." 559 U.S. at 166. "That placement suggests Congress regarded the ... limit as a claim-processing rule...." *Henderson*, 131 S.Ct. at 1205.

There is nothing exceptional about the language of section 2401(b) stating that untimely claims will be "forever barred." Every statute of limitations would be described as creating a "bar" to untimely claims. And the bar created by a statute of limitations is intended to be permanent, not – like the automatic stay in bankruptcy – merely a temporary postponement of the time-barred action. "§ 2401(b) merely states what is ordinarily true of statutory filing deadlines: once the limitation period ends, whether extended by the application of tolling principles or not, a plaintiff is 'forever barred' from presenting his claim to the relevant adjudicatory body." Pet.App. 15a. "[C]alling a rule nonjurisdictional does not mean that it is not mandatory.... This Court has long 'rejected the notion that "all mandatory prescriptions, however, emphatic, are ... properly typed jurisdictional."'" *Gonzalez*, 132 S.Ct. at 651 (quoting *Henderson*, 131 S.Ct. at 1205).

The government argues that "[t]he ... text ... attaches a specific jurisdictional *consequence* to delayed filings, stating that untimely claims 'shall be forever barred.' 28 U.S.C. 2401(b). Unlike other statutes of limitations that simply authorize a claim

to be brought within a specific period, the FTCA provision does a step further by requiring dismissal of such claims." Pet. Br. 35. (emphasis in original) But dismissal of untimely claims is the normal consequence of a statute of limitations. "[A] time limitation may be emphatic, yet not jurisdictional." *Sebelius*, 133 S.Ct. at 825. In *Union Pacific Railroad*, the Court noted that a provision which precludes consideration of a matter which violates a statutory requirement is not for that reason jurisdictional.

> The Carrier points to the ... Circular One procedural regulations, ... which provide: "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the [Railway Labor Act]." 29 C.F.R. § 301.2(b). That provision ... is a claims-processing rule.

558 U.S. at 83.

In *Irwin* the Court declined to attach significance to the various ways in which statutes of limitations are worded.

> The phraseology of this particular statutory time limit [in Title VII] is probably very similar to some other statutory limitations on suits against the Government, but probably not to all of them. In the present statute, Congress said that "[w]ithin thirty days ... an employee ... may file a civil action...." In *Soriano* ... Congress provided that "[E]very claim ... shall be barred unless the petition ...

> is filed ... within six years." An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling.

498 U.S. at 94-95. If that difference in phrasing is not sufficient to bar tolling, ipso facto it is not sufficient to render the arguably more stringent provision jurisdictional.

In *Irwin* one amicus brief supporting the plaintiff argued that the Title VII statute of limitations was non-jurisdictional because it was less stringent than the "forever barred" language of section 2401(b).[15] In response to a question from the Court, counsel for the United States specifically disagreed with that contention, insisting that this difference in the phrasing of

---

[15] Brief Amicus Curiae National Treasury Employees Union in Support of Petitioner, No. 89-5867, available at 1990 WL 10013118, at *11 n.10 ("The permissive language of section 2000e-16(c) is ... materially different from the language used in other limitations statutes this Court has construed where suits have been brought against the government. *E.g.*, *United States v. Mottaz*, 476 U.S. 834 (1986) (28 U.S.C. § 2409a(f) – a civil action 'shall be barred less' commenced within twelve years); *United States v. Kubrick*, 444 U.S. 111 (1979) (28 U.S.C. § 2401(b) – 'a tort claim against the United States shall be forever barred unless' it is timely presented to the agency); *Soriano v. United States*, 352 U.S. 270 (1957) (28 U.S.C. § 2101(b) – 'every claim ... shall be barred' unless filed within six years).").

Title VII and section 2401(b) was not significant.[16] And in *Reed Elsevier* the government again disavowed that sort of semantic distinction.[17]

(3) The United States contends that when the FTCA was enacted in 1946, and indeed much earlier, the phrase "shall be forever barred" had been definitively

---

[16] Oral Argument, *Irwin v. Veterans Administration*, available at 1990 WL 601331 *30-*31:

> Question: Well, in cases like Soriano and Mottaz you can point to the fact that the statute said something like suit shall be barred if not brought within so many days. There was something more than the mere time limit set for it here.
>
> Mr. Roberts: Your Honor, that distinction is there, but I don't think it's a distinction that makes a difference. I think that type of language has more to do with the legal rhetoric at the time the statute was passed. There are many statutes and rules that are unquestionably jurisdictional that don't have the shall be forever barred language.

[17] Oral Argument, *Reed Elsevier v. Muchnick*, available at 2009 WL 3197880 at *27:

> Chief Justice Roberts: There really are, in our recent decisions, it seems to me, two different lines of authority. There is Bowles and the John R. Sand and Gravel, which treats these sorts of things as jurisdictional, and the Arbaugh line that doesn't. And it does seem to me that the language here, 'No suit shall be instituted,' sounds an awful lot like 'suit shall be barred,' or the other language in – in Bowles.
>
> Ms. Anders: I think it's similar to a lot of language that's used in statutes of limitations, which are traditionally considered non-jurisdictional, that no statute – no suit shall be instituted.

interpreted by this Court to indicate that a statute of limitations is jurisdictional. The government's argument has far reaching implications, because a number of major federal statutes contain limitations provisions using this same phrase, including the Clayton Act, the Racketeer Influenced and Corrupt Organizations Act, and the Fair Labor Standards Act. Pet.App. 16a-18a; see App. 15a-16a. The Department of Labor's ability to enforce the Fair Labor Standards Act, which was adopted in the same era as the FTCA, is thus at issue in this case. And if this Court were to go even further and hold, as the government may be suggesting, that the language of section 2401(a) – "shall be barred" – is also jurisdictional, that would affect the statutes of limitations under an even larger group of major federal laws. For example, the general statute authorizing actions *by* the United States provides that any contract claim "shall be barred" if not commenced within six years, and that tort claims "shall be barred" if not brought within three years. 28 U.S.C. §§ 2415(a), 2415(b).

The decisions relied on by the government do not purport to interpret that phrase "shall be forever barred." That phrase was not in the Tucker Act of 1887, and it is not in the Tucker Act today. The phrase did appear in the 1863 Act that was the predecessor of the Tucker Act. Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767. But in 1887, when Congress adopted the Tucker Act, it did not use that wording, and instead provided that "no suit against the Government of the United States, shall be allowed under

this act unless the same shall have been brought within six years after the right accrued for which the claim is made. Act of March 3, 1887, ch. 359, 24 Stat. 505. When Congress amended the Tucker Act in 1911, it retained the 1887 language for claims under $10,000, which could also be brought in district court, but returned to the phrase "shall be forever barred" for other claims in the Court of Claims. Act of March 11, 1911, ch. 231, § 24, 36 Stat. 1091-93. And finally in 1948 Congress removed that phrase from the statute, and adopted the language that remains today in section 2401(a), providing that claims "shall be barred" unless filed with the Court of Claims within six years. Act of June 25, 1948, ch. 646, § 2501, 62 Stat. 976. Presumably because of this history, the brief for the United States often (but not invariably) refers to the language of the 1863 Act or the 1911 Amendment, rather than to the terms of the Tucker Act.

Although this Court has repeatedly held that the limitations period in the Tucker Act is jurisdictional, that conclusion was not based on the varying manner in which the limitations section itself has been worded. Because those decisions never turned on the particular language of the limitations section, they cannot fairly be characterized as stating that any variant of those provisions "speaks in jurisdictional terms." None of those cases attach jurisdictional significance to the word "barred" (in the 1887 and 1948 versions of the Tucker Act) or "forever barred" (in the 1863 Act and the 1911 Amendment). Rather,

the reasoning of this line of decisions has consistently been simply that in an action against the United States, *all* statutory requirements are limitations on the government's consent to be sued, and thus jurisdictional.

Kendall v. United States, 107 U.S. 123 (1883), rested on that ground:

> We [previously] said ... that the government could not be sued except with its consent, and that it may restrict the jurisdiction of the court of claims to certain classes of demands. The acts in question do contain restrictions which the court may not disregard. For instance, where it appears in the case that the claim is not one for which, consistently with the statute, a judgment can be given against the United States, it is the duty of the court to raise the question where it is done by plea or not. To that class may be referred claims which are declared barred if not asserted within the time limited by statute.

107 U.S. at 125.

The Court followed the same line of reasoning in *Finn v. United States*, 123 U.S. 227 (1887):

> [T]he statute ... makes it a condition or qualification of the right to a judgment against the United States that ... the claim must be put in suit by the voluntary action of the claimant ... within six years after suit

> could be commenced thereon against the government....
>
> The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making a defense must plead the statute if he wishes the benefit of its provision, has no application to suits in the court of claims against the United States. An individual may waive such a defense ... ; but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the court of claims.... [T]he government ... has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued....

123 U.S. at 232-33. *United States v. Seminole Nation*, 299 U.S. 417, 421 (1937), similarly held that "[a]s the United States may not be sued without its consent, causes of action not alleged within the [limitations] period allowed may not be enforced. *Finn v. United States*...."[18] The particular wording of the statute of limitations at issue was entirely irrelevant to the

---

[18] The other decisions relied on by the government contain no reasoning of their own, but merely cite or quote *Finn*. *De Arnaud v. United States*, 151 U.S. 483, 495-96 (1894); *United States v. New York*, 160 U.S. 598, 616-17 (1896); *United States v. Wardwell*, 172 U.S. 48, 52 (1898).

holding in these cases that the six-year limitations period in the various iterations of the Tucker Act, and its predecessor, were jurisdictional. It is thus incorrect to suggest, as the government does, that those decisions were an interpretation of the "language" or "formulation" in the limitations provision.[19]

The government's current position that decisions such as *Finn* rested on an interpretation of the phrase "forever barred" is at odds with the manner in which the United States in *Bowen* urged the Court to interpret those same opinions. The Social Security Act statute of limitations at issue in *Bowen* did not

---

[19] Pet. Br. 20 ("Congress used the exact *language* that this Court had repeatedly construed as jurisdictional in the directly parallel context of Tucker Act suits.") (emphasis added, bold omitted), 21 ("When Congress drafted the FTCA time bar in 1946, it used the same unequivocal *text* ('shall be forever barred') that appeared in the parallel time bars applicable to monetary claims against the United States under the 1863 and 1911 Acts. This court had already interpreted that *language* – on at least six separate occasions – as imposing a jurisdictional requirement not subject to waiver or equitable tolling.") (emphasis added and omitted), 26-27 ("when Congress enacted the FTCA time bar in 1946, it adopted a *formulation* that this Court had already interpreted – multiple times, in the directly analogous context of the Tucker Act to limit the jurisdiction of federal courts to adjudicate claims against the United States.... [I]n 1946, as today, it was well settled that 'in adopting the *language* used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such *language*, and made it a part of the enactment.' *Hecht v. Malley*, 265 U.S. 144, 153 (1924). Congress's decision to borrow the *language* of the 1863 and 1911 Acts clearly manifested its intent to prohibit equitable tolling of FTCA claims.") (emphasis added, footnote omitted).

contain the phrase "forever barred." It provided, rather, that following a final decision by the Secretary, an individual "may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision." 42 U.S.C. § 405(g). In *Bowen* the Solicitor General insisted that the decision in *Finn* was controlling, an argument that would make no sense if – as the government now suggests – *Finn* was based on an interpretation of the phrase "forever barred." Instead, the United States argued in *Bowen* that *Finn* had held that *all* statutes of limitations governing actions against the United States are jurisdictional because they were a condition of the government's consent to being sued,[20] an account of

---

[20] Brief for Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *40-44:

> The condition that a suit be filed within 60 days is an explicit limitation on the district court's jurisdiction under 42 U.S.C. 405(g).... This view of the 60-day filing requirement in 42 U.S.C. 405(g) is consistent with the interpretation of other statutes that waive the government's sovereign immunity but limit the time within which a suit may be brought. The seminal case is *Finn v. United States* ... in which the Court held ... that '[s]ince the Government is not liable to be sued, as of right, by any claimant, and since it has asserted to a judgment being rendered against it only in certain classes of cases brought within a prescribed period' ... it was the duty of the court to dismiss the action if it was untimely.... The conclusion that Section 405(g) should be so construed is reinforced by the fact that ... other statutory limitations on bringing suit against the government uniformly have been

(Continued on following page)

Finn that made irrelevant the wording of the particular statute of limitations at issue in that case.

(3) Like the jurisdictional provisions in *Henderson*, *Arbaugh*, *Zipes*, *Irwin*, and *Reed Elsevier*, the jurisdictional provision in section 1346(b)(1) regarding actions under the FTCA contains no reference to the separate requirement (here the statute of limitations) claimed to be jurisdictional.[21] The particularly detailed prerequisites set out in section 1346(b)(1) for the exercise of jurisdiction over an FTCA claim are

---

> understood to be conditions on the waiver of sovereign immunity and therefore jurisdictional prerequisites to suit.... *Finn* ... [T]he Court ... h[e]ld[ ] in *Finn* ... that ... a [statute of limitations] prerequisite to suit is jurisdictional....

(Emphasis, capitalization and italics omitted).

[21] See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Reed Elsevier v. Muchnick*, available at 2009 WL 1601031 at *13 ("Congress broadly vested the federal district courts with original jurisdiction over copyright actions, without specifying that jurisdiction is in any way dependent on registration. Copyright actions are encompassed within the grant of federal-question jurisdiction in 28 U.S.C. 1331, ... and also within the independent grant of jurisdiction over copyright and patent actions in 28 U.S.C. 1338(a).... Neither Section 1338(a) nor Section 1331 is confined by its terms to actions involving works that have been registered by the Copyright Office."); Brief for the United States as Amicus Curiae Supporting Petitioner, *Arbaugh v. Y & H Corp.*, available at 2005 WL 1811402 at *15 ("nothing in Title VII's broad jurisdictional provision limits the court's subject matter based on *any* element of the cause of action, much less the number of a defendant's employees.... Title VII's jurisdictional provision [does not] make any reference to the term 'employer,'....").

inconsistent with the government's effort to read an *additional* jurisdictional requirement into the separate provision of section 2401(b). To establish jurisdiction under section 1346(b)(1), it is necessary, and sufficient, to assert a claim

> [1] against the United States, [2] for money damages, ... [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

FDIC v. Meyer, 510 U.S. 471, 477 (1994) (quoting 28 U.S.C. § 1346(b)(1). "A claim comes within this jurisdictional grant ... if it alleges the six elements...." *Id.* If a complaint contains all of the required elements, "the district courts ... *shall* have ... jurisdiction...." 28 U.S.C. § 1346(b)(1) (emphasis added). The government's contention that a district court nonetheless would lack jurisdiction over such a claim if it were untimely is inconsistent with the mandatory language of the statute.

The government's suggestion that section 2401(b) imposes an unstated additional requirement for the existence of jurisdiction under section 1346(b)(1) is further undermined by the fact that other provisions do impose express limitations on section 1346(b). Section 1346(d) provides that "[t]he district courts

shall not have jurisdiction under this section of any civil action or claim for a pension." 28 U.S.C. § 1346(d). Section 2671 defines the phrase "employee of the government" in section 1346(b). 28 U.S.C. § 2671. Section 2680, headed "Exceptions," provides that "[t]he provisions of this chapter and section 1346(b) shall not apply to" 13 categories of exclusions, such as actions involving the performance of a discretionary function (section 2680(a)), claims arising out of the transmission of letters or other postal matters (section 2680(b)), and claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680. It is not clear whether the provisions of sections 2671 and 2680 limit the jurisdiction of the district courts under section 1346(b)(1), or only limit the private cause of action implicit in that section. But it would surely be inconsistent with this highly detailed array of limitations, definitions and exceptions to read into section 2401(b) an additional, unstated restriction.

(4) Treating section 2401(b) as jurisdictional, and thus as a bar to equitable tolling, would be inconsistent as well with the provisions of the FTCA stating that the United States (except as otherwise specified) shall be liable in the same circumstances in which liability would be imposed on a private defendant. The jurisdictional grant and cause of action in section 1346(b)(1) applies "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or

omission occurred." Section 2674 similarly provides that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. § 2674. The state statutes of limitations that would determine whether a private defendant was "liable" for a tort are generally treated as non-jurisdictional and as subject to equitable tolling. The length of the limitations period in section 2401(b), and the FTCA exhaustion requirement, expressly impose federal standards that may deny liability where it would otherwise exist under state law. But in the absence of any express federal statute declaring the federal limitations period to be jurisdictional, a refusal to permit equitable tolling would result in a denial of liability in circumstances where "a private person ... would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

(5) The legislative history relied on by the government cannot provide the clear statement required by this Court's decisions. At least ordinarily a clear "statement" refers to a statement in the text of the statute, not a statement at a committee hearing or even on the floor of the House or Senate. The Court need not decide whether legislative history alone could ever satisfy a clear statement rule,[22] because

---

[22] See *Gonzalez*, 132 S.Ct. at 662 (Scalia, J., dissenting) ("I know of no precedent for the proposition that legislative

(Continued on following page)

the material relied on by the United States would in any event be insufficient to do so.

This case does not involve an unequivocal statement in a contemporaneous committee report, or by the sponsors of the FTCA, that the section 2401(b) statute of limitations is jurisdictional. Some of the legislative developments invoked by the government occurred decades before or after the 1946 enactment of the FTCA. *E.g.*, Pet. Br. 38 n.20 (legislation proposed in 1926 and 1928), 49 (legislation proposed in 1969), 50 (testimony in 1986). Pointing to bills introduced in 1932 and 1933 that would have expressly provided that the statute of limitations was jurisdictional, the government argues that those unenacted proposals somehow "confirm that Congress envisioned [in 1946] that the FTCA time limits would operate as jurisdictional constraints on the courts' power to adjudicate claims." Pet. Br. 26 n.11. On the other hand, the government insists that the introduction between 1949 and 1989 of other never-enacted proposals, which would have authorized various types of tolling in section 2401(b), demonstrates that the FTCA does not permit any such tolling. Pet. Br. 49 and n.30.[23] That selective parsing of the legislative

---

history can satisfy a clear-statement requirement imposed by this Court's opinions.").

[23] The government argues that "[o]rdinarily, '[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.' *Russello v. United States*, 464 U.S. 16, 23-24 (1983)." Pet. Br. 38-39. But the proposals to which it

(Continued on following page)

history really does resemble Judge Harold Leventhal's comment that the use of legislative history is the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.

Piecing together scattered legislative references to the Tucker Act with its own citations to undeniably obscure decisions under the 1863 Act, and invoking the maxim that Congress is assumed to know the state of the law, the government asserts that Congress must have "intended" that section 2401(b) be jurisdictional. Whatever its value in other contexts, this reference to the presumed intent of Congress is insufficient to satisfy the clear statement rule. There is no indication that the Congress which enacted the FTCA actually gave that question any thought.[24]

---

refers were not "earlier versions" of the actual bill which Congress enacted, but merely scattered proposals made over the two decades before dealing with the same issue.

[24] See Oral Argument, *Henderson v. Shinseki*, available at 2010 WL 4931033 at *32:

> Justice Scalia: Mr. Miller, do you really think Congress thought about this? Do you think the members of Congress who voted for this bill thought about this – this rather narrow point, about whether if you file too late it's jurisdictional?
>
> Mr. Miller: There is no indication that they did.
>
> Justice Scalia: So don't we pretty much have to go on what they wrote?
>
> Mr. Miller: Yes....

(Continued on following page)

C. Prior Decisions of This Court Do Not Hold That The Section 2401(b) Statute of Limitations Is Jurisdictional

The rule in *Irwin*, and the more circumspect delineation of jurisdictional provisions under *Arbaugh* and its progeny, do not require "revisiting past precedents." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008); see *Bowles v. Russell*, 551 U.S. 205 (2007). But the exception recognized in *John R. Sand & Gravel* and *Bowles* is a narrow one. In *John R. Sand* this Court had "long interpreted the ... limitations statute at issue as imposing a jurisdictional requirement." 552 U.S. at 134. The Court could only have held that statute non-jurisdictional by "reject[ing] or ... overturn[ing]" a series of decisions dating from the late nineteenth century, and disregarding "[b]asic principles of *stare decisis*." 552 U.S. at 138-39. Similarly, in *Bowles* a decision that the statute in question was non-jurisdictional would have required "overruling a century's worth of practice," 551 U.S. at 210 n.2, and overturning the Court's repeated "longstanding treatment of statutory limits for taking an appeal as jurisdictional." 551 U.S. at 210.

Justice Scalia: I get you a dollar to a donut that – that nobody thought about this narrow – narrow issue. So it – it ought to be a question of – of what this language ought to be taken to mean. What's its fairest reading?

The circumstances of this case do not come close to meeting that demanding standard. This Court has never held that the statute of limitations in section 2401(b) is jurisdictional. There is no "definitive earlier interpretation of the statute" in this Court. *John R. Sand & Gravel*, 552 U.S. at 138. At one time decisions like *Finn* and *Soriano* suggested that all statutes of limitations governing claims against the United States were jurisdictional. But this Court long ago abandoned that approach, first in a series of Social Security decisions culminating in *Bowen*[25] and then in *Irwin*. The question here is not whether to "revisit[]" prevailing precedents, but whether to resurrect a line of thinking this Court abandoned decades ago.

The government suggests that this case and decisions like *Finn* and *Soriano* present the same legal issue, whether a statute "proscribing a specific time limit as a condition of the waiver of sovereign immunity for suits against the United States for money" is jurisdictional. Pet. Br. 28. But the exception recognized in *John R. Sand & Gravel* and *Bowen* does not apply at that level of generality; after all, the limitations periods held subject to equitable tolling in *Bowen* and *Irwin* could as easily be characterized in just those terms. In *Bowen* the United States urged this Court, in terms not unlike its contention in this

---

[25] See *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975); *Mathews v. Eldridge*, 424 U.S. 319, 328 n.9 (1976).

case, to treat decisions like *Finn* and *Soriano* as establishing a universal rule applicable to any "suit against the government to recover money from the Treasury."[26] The Court rejected that argument in *Bowen*, and it manifestly cannot lay claim to the protection of *stare decisis*.

A decision that the limitations period in section 2401(b) is not jurisdictional would not create an irreconcilable conflict with the holdings in *Finn*, *Soriano* and *John R. Sand & Gravel* that the Tucker Act statute of limitations in section 2501 is jurisdictional. "[T]he earlier cases lead, at worst, to different interpretations of different, but similarly worded, statutes; they do not produce 'unworkable' law." *John R. Sand & Gravel*, 552 U.S. at 139 (quoting *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1998)). There are significant differences between

---

[26] Brief for the Petitioners, *Bowen v. City of New York*, available at 1985 WL 670035 at *43 ("It was against this background that Congress in 1939 enacted Section 405(g) and thereby waived the government's immunity to suits arising under the Social Security Act. Because *Munro* had been decided only a year earlier and because Section 405(g) authorizes a suit against the government to recover money from the Treasury, it is reasonable to assume that Congress likewise intended the 60-day filing requirement in Section 405(g) to state a jurisdictional limitation."); Reply Brief for the Petitioners, *Bowen v. City of New York*, available at 1986 WL 728260 at *18 ("Principles of sovereign immunity – including the rule that conditions on Congress's waiver of that immunity may not be waived or extended by the courts in the absence of express congressional authorization – apply with particular force where a claim for money against the federal government is involved.").

the Tucker Act and the FTCA. Unlike the effect of the limitations period in the original 1863 Act, which created the very Court of Claims whose jurisdiction it limited, treating as jurisdictional the FTCA statute of limitations being applied in a district court – and thus precluding equitable tolling – would "displace [that] court's traditional equitable authority," a result which this Court seeks to avoid absent the "clearest command." *Holland v. Florida*, 560 U.S. at 646. When Congress in 1946 provided for adjudication of FTCA claims in district court, Rule 8(c) of the Federal Rules of Civil Procedure expressly treated the statute of limitations as an affirmative defense.

III. THE SECTION 2401(b) STATUTE OF LIMITATIONS IS SUBJECT TO EQUITABLE TOLLING

"It is hornbook law that limitations periods are 'customarily subject to "equitable tolling,"' .... unless tolling would be 'inconsistent with the text of the relevant statute'.... Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (quoting *Irwin*, 498 U.S. at 95, and *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). "We ... presume that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute." *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224, 1232 (2014). "We have previously made clear that a non-jurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'"

Holland v. Florida, 560 U.S. 631, 645-46 (2010) (quoting *Irwin*, 498 U.S. at 95-96) (emphasis in *Holland*). "[T]he assumption that Congress intended equitable tolling to be available in a statute 'is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation' of statutes. *Ibid.*" Brief for the United States, *Young v. United States*, No. 00-1567, at 33-34. "Time requirements in lawsuits between private litigants are customarily subject to equitable tolling...." *Irwin*, 498 U.S. at 95. That presumption applies with particular force to the FTCA, because section 2674 provides that the United States shall be liable for tort claims "to the same extent as a private individual under like circumstances."

The issue is whether "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original). There is nothing about the types of claims covered by the FTCA that militates against application of the usual equitable tolling rule. Unlike *Beggerly*, the statute does not concern quiet title actions where it is of "special importance that landowners know with certainty what their rights are." 524 U.S. at 49. The relatively brief six-month filing period in section 2401(b) is far different than the "unusually generous" 12-year period in *Beggerly*. See *Holland* 560 U.S. at 647 ("in contrast to the 12-year limitations period at issue in *Beggerly*, AEDPA's [one year] limitations period is not particularly long.") The FTCA does not have multiple iterations of the same limitations

period, as was the case in *Brockamp*, 519 U.S. 347, 350-51 (1997). Unlike the administration of the Internal Revenue Code, judicial consideration of limitations issues *is* "characterized by case-specific exceptions reflecting individual equities." 524 U.S. at 352. Equitable tolling in civil litigation does not portend the massive administrative problems at issue in *Brockamp*. And unlike the situation in *Sebelius*, this case concerns a traditional limitations period for the filing of a civil action, not the deadline for taking an administrative appeal. 133 S.Ct. at 827-29.

The government argues that

> Congress legislated against a background assumption that ... time bars would be strictly construed not to permit equitable tolling. This Court acknowledged that background rule in *Soriano*, ... where it explained that Congress enacted the Tucker Act and statutes allowing tort claims against the government on the "assum[ption] that the limitation period prescribed meant just that period and no more."

Pet. Br. 16.[27] This argument asks the Court to hold that the presumption announced in *Irwin* in favor of

---

[27] The government unsuccessfully advanced the same argument in *Irwin*. Oral Argument, *Irwin v. Veterans Administration*, available at 1990 WL 601331 at *36 ("Mr. Roberts: ... [T]he Court emphasized in the Soriano case ... that in this area as no other, Congress is entitled to assume when it set a time period, that it meant that time period and not a longer one.").

equitable tolling of claims against the United States will apply only to statutes enacted after the 1990 decision in *Irwin*; pre-*Irwin* statutes, the United States contends, should be governed by the opposite presumption. But such a rule would largely eviscerate *Irwin*. The government's proposed presumption against equitable tolling is not restricted to the original 1946 enactment of the FTCA. It insists that "Congress enacted the 1966 revision of the FTCA against the backdrop of this Court's 1957 analysis in *Soriano* ... [which] assured Congress of the settled doctrine that a statutory time limit with respect to suits against the government could not be tolled unless the statute said so expressly." Pet. Br. 42. But if that were right, *Irwin* itself would have to be overturned, because the Title VII provision at issue in that case was enacted in 1972, only 6 years after the FTCA amendment.

The United States insists that the language of section 2401(b) precludes equitable tolling.

> That text is straightforward and direct: It declares that "[e]very" untimely claim "shall be forever barred," and it contains no exceptions, caveats, or ambiguities. The "unusually emphatic form" Congress used to establish the time bar supports treating it as a strict requirement not subject to equitable tolling. *Brockamp*, 519 U.S. at 349-54.

Pet. Br. 35. But there is actually nothing particularly unusual about the language of this provision. Statutes of limitations always "bar" untimely claims, the

preclusion of such claims is ordinarily permanent, and statutes of limitations are often free of ambiguity. In this passage, the government insists that the original terms of section 2401(b) barred tolling because they did *not* include any exceptions. Fifteen pages later the government advances the opposite argument, insisting that section 2401(b) does not permit tolling because in 1988 Congress *did* adopt an "exception." Pet. Br. 50.[28]

In 1966[29] Congress adopted with regard to government initiated contact and tort actions a number

---

[28] See Oral Argument, *Young v. United States*, No. 00-1567, available at 2002 WL 57250 at *28:

"Ms. Millett: ... [I]n virtually every case that I'm aware of, equitable tolling is applied when the statute is silent, and in fact when it may provide specifically for tolling in other circumstances, as occurred in Bowen v. City of New York and American Pipefitters v. Utah."

[29] The government also argues that the decision of Congress in 1949 to increase by one year the then-existing limitations period as the presumptively exclusive method of dealing with "hardship cases." Pet. Br. 41. But the primary purpose of this change was to bring the FTCA limitations period into line with other analogous limitations. H.R. Rep. 81-276 (1949) ("The committee feel that, in comparison to analogous State and Federal statutes of limitation, the existing 1-year period is too short and tends toward injustice in many instances. For example, an analysis of the limitation of the 48 States and the District of Columbia reveals that the.... over-all combined average is ... 2.92 years, and this over-all average is the one to which the Tort Claims Act limitation should be compared.... Federal statutes providing time limitations for the bringing of tort actions indicate an over-all average of 2.2 years.... [T]he existing limitation of 1 year in the Federal Tort Claims Act is manifestly

(Continued on following page)

of specific "Exclusions" expressly authorizing tolling of the applicable statutes of limitations. 28 U.S.C. § 2416. The United States contends "[t]hat separate law thus shows that when Congress wanted to authorize tolling of a statutory time limit, it did so explicitly by statute." Pet. Br. 46. On this view, the enactment of the section 2416 tolling provisions created a presumption against any non-statutory equitable tolling, a rule that would apply with particular force to bar any non-statutory equitable tolling of civil litigation by the United States itself. It is difficult to understand how these far reaching arguments can be reconciled with *Irwin* or the longstanding presumption in favor of equitable tolling.

The government contends that the Westfall Act was adopted in 1988 to create a tolling rule for certain FTCA cases, thus indicating that Congress did not intend that equitable tolling be otherwise available under the FTCA. Pet. Br. 50-52. The purpose of the Westfall Act, it argues, was to aid plaintiffs who sue individuals whom they did not know were federal employees, and who learn of that status only after the two-year limitation period has expired, when it was too late to present a claim under the FTCA. Pet. Br. 51. But the actual purpose of the Westfall Act was not to provide a new procedural benefit for plaintiffs, but to protect federal workers. The statute was adopted to overturn this Court's decision in *Westfall v. Erwin*,

---

unjust and not in consonance with the practice prevailing in analogous departments of law.").

484 U.S. 292 (1988), which Congress believed had "dramatically changed the law which governs the personal tort liability of Federal employees." H.R. Rep. 100-700, 2 (1988). The pre-*Westfall* case law with which Congress was concerned was not about any unfairness to plaintiffs unaware that their injuries were caused by federal workers, but "the general rule applicable to Federal employees [who before *Westfall*] were absolutely immune from personal liability in State common law tort actions that resulted from activities within the scope of their employment." *Ibid.* The legislative history reflects solicitude for the legal plight of federal workers *after Westfall,*[30] not the problems of plaintiffs *before* that decision. The Westfall Act protects federal workers from "potentially ruinous personal liability," *id.* at 3, by providing that the United States can be substituted for federal employees in tort actions. The Westfall Act does nothing at all for plaintiffs so long as the individual federal employee remains the defendant. Section 2679(d)(5), the provision to which the government refers, applies only in cases where the United States is substituted for the individual defendant under the Act, and a court then dismisses the claim against the government for failure to first present a claim under section 2675(a). 28 U.S.C. § 2679(d)(5). The limited

---

[30] H.R. Rep. 100-700, 3 ("The potential increase in liability that results from the *Westfall* decision affects officers and employees of all three branches of government. The possible exposure of Federal employees to personal liability could lead to a substantial diminution in the vigor of Federal law enforcement and implementation.").

purpose of section 2679(d)(5) was not to improve the lot of plaintiffs, but only to assure that they were not worse off because of the substitution of parties permitted by the Westfall Act. "[S]ection [2679(d)(5)] ... contains provisions to ensure that no one is unfairly affected by the procedural ramifications of this provision.... [N]o one who previously had the right to initiate a lawsuit will lose that right." H.R. Rep. 100-700, at 7. Even if the Westfall Act had been adopted to affirmatively provide a form of tolling, that would not demonstrate that equitable tolling is otherwise unavailable under the FTCA. In the states, ordinary equitable tolling commonly exists alongside statutes that provide for tolling in particular situations.[31]

---

[31] Tolling takes two different forms. First, there is equitable tolling. Depending on the jurisdiction, courts recognize one or more equitable grounds of varying degrees of specificity for suspending the running of the limitations period. Courts have discretion to determine whether to apply equitable tolling in a given case, based on what they believe is a just result.

In addition to equitable tolling, specific statutes suspend the running of the limitations period under particular circumstances. For example, most states have a statute that tolls the limitations period with respect to claims against a defendant who is a resident of the state, for the amount of time the defendant is absent from the state.

Eli Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. 1015, 1040-41 (1997) (footnotes omitted).

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

TOM STEENSON
P.O. Box 820207
Portland, OR 97282
(971) 645-6625

BETH CREIGHTON
MICHAEL ROSE
CREIGHTON & ROSE, P.C.
500 Yamhill Plaza Building
Portland, OR 97204
(503) 221-1792

Counsel for Respondent

**Counsel of Record*

Statutes Involved

1. 28 U.S.C. § 1346 provides:

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange

Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the

United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

2. 28 U.S.C. § 2401 provides:

Time for Commencing Action Against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

3. 28 U.S.C. § 2501 provides:

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

4. 28 U.S.C. § 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

5. 28 U.S.C. § 2674 provides:

Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise

to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

6. 28 U.S.C. § 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

7. 28 U.S.C. § 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

9. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767, provides in pertinent part:

Sec. 10. *And be it further enacted,* That every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues. . . .

10. Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887), provides in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of American in

Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. . . .

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

11. Act of March 11, 1911, ch. 231 § 24, 36 Stat. 1091-93, provides in pertinent part:

Sec. 24. The district courts shall have original jurisdiction as follows:

* * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. . . . *provided* . . . , That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. . . .

* * *

Sec. 156. Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability ceased; but no other disability than

those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

12. Act of June 25, 1948, ch. 646, § 2501, 62 Stat. 976, provides in pertinent part:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

Federal Statutes Providing That Claims or Actions Not Filed Within the Limitations Period Shall Be "Forever Barred"

7 U.S.C. § 2305(c) (limitations period for claims arising out of forbidden trade practices by producers of agricultural products)

12 U.S.C. § 1977(2) (limitations period regarding actions based on forbidden tying arrangements by banks)

15 U.S.C. § 15b (limitations period for actions under the Clayton Act)

15 U.S.C. § 16(i) (limitations period for actions under the Clayton Act)

15 U.S.C. § 1223 (limitations period regarding certain automobile suits against manufacturers)

18 U.S.C. § 2712(b)(1)(2) (limitations period for certain actions against the United States arising out of certain violations of the Foreign Intelligence Surveillance Act)

22 U.S.C. § 277d-20 (applications for reimbursement under 22 U.S.C. § 277d-19)

22 U.S.C. § 1642b (limitations period for certain claims related to seizure of property in Czechoslovakia)

22 U.S.C. § 4134(a) (claims related to certain grievances by members of the Foreign Service)

25 U.S.C. § 255(a) (limitations period for actions under the Fair Labor Standards Act)

25 U.S.C. § 565b (claims of members of Klamath tribe or their heirs)

25 U.S.C. § 833b (claims for per capita shares by heirs of Osage Indian blood)

25 U.S.C. § 993 (claims for per capita shares regarding tribal funds of Cherokee Nation)

25 U.S.C. § 1164 (claims for per capita shares regarding tribal funds of Cheyenne-Arapaho Indians)

25 U.S.C. § 1300i-11(b)(1) (claims related to partition of joint reservation)

28 U.S.C. § 2401(b) (limitations period under Federal Tort Claims Act)

42 U.S.C. § 5412(b) (limitations period regarding actions related to manufactured homes)

43 U.S.C. § 1619(c) (limitations period for certain Alaska Native Fund claims)

45 U.S.C. § 1206(1)(3)(B) (credit for prior Federal service under retirement system "shall be forever barred" by certain payments)

50 App. U.S.C. § 1982 (deadline for claims related to internment of Japanese Americans)

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 3 - 2014
OFFICE OF THE CLERK

No. 13-1074

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. Congress fashioned the FTCA time bar to mirror the jurisdictional time bar applicable to Tucker Act suits 3
B. Sovereign-immunity considerations confirm that the FTCA time bar precludes equitable tolling 8
1. Irwin does not require courts to ignore sovereign-immunity principles when assessing Congress's intent 9
2. In 1946 and 1966, Congress understood the FTCA time bar to be a jurisdictional limit not subject to tolling 11
C. Respondent's textual arguments lack merit 15
D. Respondent fails to address other features of the FTCA's text and history confirming that tolling is prohibited 19

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 18
Bowen v. *City of N.Y.*, 476 U.S. 467 (1986) 14
Bowles v. *Russell*, 551 U.S. 205 (2007) 15, 17, 18
Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 7, 9
Dalehite v. *United States*, 346 U.S. 15 (1953) 22
de Arnaud v. *United States*, 151 U.S. 483 (1894) 5
FDIC v. *Meyer*, 510 U.S. 471 (1994) 16
Finn v. *United States*, 123 U.S. 227 (1887) 5
General Dynamics Land Sys., Inc. v. *Cline*, 540 U.S. 581 (2004) 14
Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 4, 7, 17
Hilton v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) 8

Cases—Continued: Page

Holland v. *Florida*, 560 U.S. 631 (2010) 9
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 3, 9, 10, 12, 14
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) ..... *passim*
Kendall v. *United States*, 107 U.S. 123 (1883) 5
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 15
Kosak v. *United States*, 465 U.S. 848 (1984) 13
Kossick v. *United States*, 330 F.2d 933 (2d Cir.), cert. denied, 379 U.S. 837 (1964) 19
Lozano v. *Montoya Alvarez*, 134 S. Ct. 1224 (2014) 9, 10
McNeil v. *United States*, 508 U.S. 106 (1993) 15, 16
Merck & Co. v. *Reynolds*, 559 U.S. 633 (2010) 7
Munro v. *United States*, 303 U.S. 36 (1938) 5
North Star Steel Co. v. *Thomas*, 515 U.S. 29 (1995) 7
Reed Elsevier, Inc. v. *Muchnick*, 559 U.S. 154 (2010) 7, 17, 22
Richards v. *United States*, 369 U.S. 1 (1962) 19
Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) 1, 7, 10
Simon v. *United States*, 244 F.2d 703 (5th Cir. 1957) 14
Soriano v. *United States*, 352 U.S. 270 (1957) 2, 12, 13
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 11
United States v. *Brockamp*, 519 U.S. 347 (1997) 10, 11
United States v. *Dalm*, 494 U.S. 596 (1990) 11, 17, 18
United States v. *Muniz*, 374 U.S. 150 (1963) 22
United States v. *New York*, 160 U.S. 598 (1896) 5
United States v. *Wardwell*, 172 U.S. 48 (1898) 5
West v. *Gibson*, 527 U.S. 212 (1999) 13

Statutes and regulations: Page

Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 765 5
Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991 ..... 15, 17
Federal Tort Claims Act,
28 U.S.C. 2401(b) 1, 2, 3, 19, 20
Judicial Code, ch. 231, § 156, 36 Stat. 1139 5
26 U.S.C. 6511(a) 18
28 U.S.C. 1291-1296 (Ch. 83) 18
28 U.S.C. 1331 *et seq.* (Ch. 85) 15, 17
28 U.S.C. 1346 17
28 U.S.C. 1346(a)(1) 18
28 U.S.C. 1346(b) 16
28 U.S.C. 1346(b)(1) 15, 16, 19
28 U.S.C. 1491 *et seq.* (Ch. 91) 18
28 U.S.C. 1491 18
28 U.S.C. 2101 *et seq.* (Ch. 133) 18
28 U.S.C. 2107 15
28 U.S.C. 2107(a) 17, 18
28 U.S.C. 2401 *et seq.* (Ch. 161) 17
28 U.S.C. 2401(a) 20
28 U.S.C. 2416 ..... 20, 21
28 U.S.C. 2501 *et seq.* (Ch. 165) 18
28 U.S.C. 2501 ..... 2, 18
28 U.S.C. 2674 19
28 U.S.C. 2675(a) 15
28 U.S.C. 2679(a) 16
28 U.S.C. 2679(d)(2) 21

Miscellaneous: Page

34 Am. Jur. *Limitation of Actions* (1941 & 1956 Supp.) 14
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 20
S. Rep. No. 388, 61st Cong., 2d Sess. (1910) 5
S. Rep. No. 1196, 77th Cong., 2d Sess. (1942) 4
S. Rep. No. 1400, 79th Cong., 2d Sess. (1946) 4

In the Supreme Court of the United States

No. 13-1074

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Congress's intent controls whether a particular statutory time limit is subject to equitable tolling. See, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137-138 (2008). Here, the text, context, and history of the time bar in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), demonstrate that Congress enacted an absolute deadline that cannot be tolled.

When Congress drafted the FTCA in 1946, it modeled the time bar on the virtually identical provision governing Tucker Act suits. This Court had repeatedly held that provision to be a jurisdictional limit not amenable to tolling. Congress's decision to borrow the same text using the same sentence structure when it enacted the FTCA demonstrates that equitable tolling is precluded under the FTCA as well.

Congress confirmed that intent repeatedly over the following decades. See U.S. Br. 40-52. In 1949, it addressed hardship caused by the FTCA's original one-year deadline—not by allowing equitable tolling, but by extending the deadline to two years. In 1966, it reenacted the time bar without material change—after the lower courts had held that Section 2401(b) was jurisdictional, and after *Soriano* v. *United States*, 352 U.S. 270, 275 (1957), had reaffirmed that the virtually identical time bar in 28 U.S.C. 2501 was not subject to tolling and had indicated that the same rule would apply to "tort actions" against the United States. From the 1950s through the 1980s, Congress enacted numerous private laws conferring "jurisdiction" on district courts "notwithstanding" the time bar, and it repeatedly rejected proposals to amend the FTCA to permit various types of equitable tolling. And in 1988, it enacted a narrow form of tolling applicable only in a single, carefully delineated circumstance not at issue here.

In short, the FTCA's history shows that—at every turn—Congress chose not to authorize the broad equitable tolling rule embraced by the court of appeals in this case. Respondent largely ignores this history, and her arguments in support of tolling lack merit. She urges the Court to disregard the textual and structural parallel between the time bars governing Tucker Act and FTCA suits on the ground that this Court's pre-1946 Tucker Act decisions did not focus on the text of the statute and were "obscure." Her approach disregards the rule that Congress is presumed to be aware of—and intends to incorporate—settled judicial interpretations of statutory language when it repeats that language in new legislation. That rule

has special force here, where Congress intended the FTCA to fill the gap created by the Tucker Act's exception for claims sounding in tort. Respondent's other textual arguments are similarly incompatible with the statutory text and this Court's precedent.

Respondent further attempts to short-circuit any serious inquiry into Congress's intent regarding the FTCA by arguing that *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) is dispositive here. Although *Irwin* adopted a presumption that statutory deadlines for suing the federal government are subject to equitable tolling, that presumption is "rebuttable" based on "a realistic assessment of legislative intent" with respect to the particular statute at issue. *Id.* at 95. Respondent errs in clinging to *Irwin*'s presumption in the face of the text, context, and history of the FTCA, which compel the conclusion that Section 2401(b) does not authorize courts to toll the time bar.[1]

A. Congress Fashioned The FTCA Time Bar To Mirror The Jurisdictional Time Bar Applicable To Tucker Act Suits

Our opening brief explains (Br. 4-5, 20-28) that Congress modeled the FTCA time bar on the statutory time bar governing damages actions under the Tucker Act and its predecessors. The FTCA filled the gap left when Congress carved out tort claims from the Tucker Act's authorization of suits against the

---

[1] Respondent makes (Br. 1-4) a variety of factual assertions relating to the merits of her FTCA claim that are contrary to evidence in the record. The government does not respond to those factual assertions—which are disputed—because they are not implicated in the question presented (U.S. Br. i).

United States for money damages. See S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946) ("The existing exemption in respect to common-law torts appears incongruous."). Following the Tucker Act model, Congress "extend[ed] to claimants against the Government for torts of negligence the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." S. Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942).

Consistent with this purpose to create a tort-law analogue to the Tucker Act, Congress used virtually identical language in the FTCA's time bar. See U.S. Br. 22 n.7 ("Every claim against the United States cognizable * * * shall be forever barred[,] unless"). In the Tucker Act context, this Court had repeatedly interpreted that language to set forth a jurisdictional limit not subject to equitable tolling. U.S. Br. 22-24 (discussing cases). In these circumstances—"[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional"—this Court "will presume" that Congress intended to enact a jurisdictional time limit that cannot be tolled. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks and citation omitted). That rule controls here.

1. Respondent is wrong to suggest (Br. 32-38) that this Court's pre-1946 decisions holding the deadline for filing suit in the Court of Claims to be jurisdictional "do not purport to interpret" the text of the provision. In its first opinion holding that the time bar was not subject to tolling, the Court emphasized the language declaring that untimely claims "shall be forever barred" and reasoned that "[t]he express words of the

statute leave no room for contention" that any claim could proceed outside the specified period. *Kendall* v. *United States*, 107 U.S. 123, 124, 125 (1883).[2] As the Court explained, "[*e*]*very* claim—except those specifically enumerated—is forever barred unless asserted within" the six-year period. *Id.* at 125. "[I]n view of the language of the statute," *Kendall* held that "courts cannot" toll the statute for equitable reasons. *Id.* at 126. See *Finn* v. *United States*, 123 U.S. 227, 229, 232 (1887) (emphasizing "express words of the act" deeming an untimely claim "forever barred" and holding that government cannot waive the time bar).[3]

Respondent correctly notes (Br. 33-38) that this Court's cases interpreting the time bar applicable to Tucker Act suits relied heavily on sovereign-immunity considerations. But that simply *strengthens* the argument for interpreting the FTCA—which rests on identical sovereign-immunity considerations—the same way. U.S. Br. 26-32.

---

[2] Respondent notes (Br. 32-33) that the phrase "shall be forever barred" did not appear in the Tucker Act itself. That is beside the point: The language originated in 1863 and operated as a jurisdictional constraint on the authority of the Court of Claims to hear cases under the Tucker Act and its predecessors, both before and after the Tucker Act became law in 1887. See U.S. Br. 4-5 (discussing Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767, and Judicial Code (1911 Act), ch. 231, § 156, 36 Stat. 1139); see also S. Rep. No. 388, 61st Cong., 2d Sess. 61 (1910) (noting that 1911 Act's time bar made "no change whatever" in "[e]xisting law").

[3] See also *Munro* v. *United States*, 303 U.S. 36, 38 n.1, 41 (1938) (citing *Finn*); *United States* v. *Wardwell*, 172 U.S. 48, 49, 52 (1898) (same); *United States* v. *New York*, 160 U.S. 598, 616-619 (1896) (same); *de Arnaud* v. *United States*, 151 U.S. 483, 495 (1894) (same).

In any event, there is no doubt that this Court's Tucker Act decisions attached jurisdictional significance to the time bar and held that its text did not permit equitable tolling. That time bar, and the Court's decisions enforcing it, thereby provided Congress with a clear model of how to draft a jurisdictional bar that could not be tolled. Because Congress employed the very same operative language using the very same sentence structure when it drafted the FTCA time bar governing the tort claims that were carved out of the Tucker Act, Congress must be presumed to have intended that language to be interpreted the same way. It makes no sense to think that Congress borrowed the identical language and structure in this deliberately parallel context to achieve the *opposite* result and *allow* equitable tolling.

2. Respondent also errs in suggesting (Br. 43) that this Court should ignore the settled Tucker Act precedents because those decisions were "undeniably obscure" and therefore may have escaped Congress's notice. The decisions were *not* obscure. They were prominent holdings governing the jurisdiction of the Court of Claims over suits under the Tucker Act—the very law on which Congress modeled the FTCA. Between 1925 and 1946, as Congress was considering various proposals to abrogate sovereign immunity to allow tort suits against the government, one of the cases—*Finn*—was itself cited dozens of times by federal courts, including on eight separate occasions by this Court.

More fundamentally, this Court has never held that Congress legislates against the backdrop of only famous decisions. Congress legislates, rather, against the backdrop of decisions concerning the particular

subject before it.[4] Precedent examining whether a time bar is jurisdictional may not capture the public's attention, but it creates the context—and thus shapes the meaning—of Congress's future enactments on the same subject. That is especially true when Congress purposefully models a new time bar on one this Court has already interpreted. It is for this reason that the Court has repeatedly said that it "will presume" that Congress intended to make a time limit jurisdictional "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as 'jurisdictional.'" *Henderson*, 131 S. Ct. at 1203 (internal quotation marks and citation omitted); see, *e.g.*, *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824; *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010).

That rule applies here: The FTCA time bar restricts the government's waiver of sovereign immunity in the same way as the parallel time bar applicable to Tucker Act suits. And the text and sentence structure of the FTCA bar is not just similar but virtually *identical* to the Tucker Act provision. Because the respective time bars are so closely affiliated with one another, they should be interpreted to mean the same thing.[5]

---

[4] See, *e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them.") (last three sets of brackets in original) (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979)).

[5] Respondent incorrectly asserts (Br. 31-32) that our argument has "far reaching implications" for other statutes of limitations

3. This Court's recent decision in *John R. Sand & Gravel*, which reaffirmed the jurisdictional status of the time limit governing Tucker Act suits, strongly supports our position here. See U.S. Br. 28. Respondent contends (Br. 44-47) that case is irrelevant because it confirmed that the Tucker Act time bar is jurisdictional based on *stare decisis*, while saying nothing about the FTCA. But one of the basic purposes of *stare decisis* is to enable Congress to legislate against a stable backdrop of law, and that doctrine "has added force when the legislature, in the public sphere, * * * ha[s] acted in reliance on a previous decision." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Here, Congress was entitled to rely on the settled meaning of the Tucker Act time bar when it incorporated the same language into the analogous provision of the FTCA.

B. Sovereign-Immunity Considerations Confirm That The FTCA Time Bar Precludes Equitable Tolling

Our opening brief explains (at 29-35, 42-45) that Congress intended to preclude tolling of the FTCA time bar in part because it conditioned Congress's waiver of sovereign immunity. Respondent contends

---

that contain the phrase "shall be forever barred," such as those applicable to the Clayton Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Fair Labor Standards Act. But those statutes, unlike the FTCA, do not incorporate the same text and sentence structure of the 1863 Act's time bar ("[E]very claim against the United States, cognizable * * * , shall be forever barred unless"); there is no reason to believe that Congress drafted them to incorporate judicial interpretations of that time bar; and neither the Clayton Act nor RICO involve waivers of sovereign immunity from claims for money damages against the United States.

(Br. 17) that *Irwin* forecloses that argument. She is mistaken.

1. Irwin does not require courts to ignore sovereign-immunity principles when assessing Congress's intent

a. *Irwin* articulated a rebuttable presumption that statutory time limits for filing suit against the federal government are subject to equitable tolling. See U.S. Br. 18-20. The Court adopted that presumption not "as a matter of some independent [judicial] authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose," *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014), but rather out of deference to what it concluded was Congress's "likely meaning in the mine run of instances," *John R. Sand & Gravel*, 552 U.S. at 137.[6] The presumption is *rebutted*—and equitable tolling is *not* available—when there is "good reason to believe that Congress did *not* want the equitable tolling doctrine

---

[6] The government agrees with respondent (Br. 10, 19-21, 49-50) that the *Irwin* presumption applies at the threshold to pre-*Irwin* statutes. Nevertheless, courts may consider whether Congress legislated before or after *Irwin* when determining whether the presumption reflects a "realistic assessment of legislative intent," 498 U.S. at 95, in any particular case. See *Holland* v. *Florida*, 560 U.S. 631, 646 (2010) (presumption is stronger as applied to post-*Irwin* statutes because "Congress * * * was likely aware that courts, when interpreting [the statute's] timing provisions, would apply the presumption"); *Cannon*, 441 U.S. at 698-699 & nn.22-23 (even if intervening Supreme Court precedent suggests a different interpretive approach, "evaluation of congressional action" still "must take into account its contemporary legal context").

to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997).[7] That clearly is the case here.

b. Respondent seeks to artificially circumscribe the inquiry into Congress's intent by declaring sovereign-immunity considerations off limits. In her view (Br. 17), "while the government may argue that a statute of limitations is jurisdictional, it may do so [under *Irwin*] only by advancing the 'same' types of contentions regarding text or other considerations that could be asserted by a private litigant."

Respondent is wrong. *Irwin* holds that sovereign-immunity considerations—*without more*—do not establish that Congress intended to foreclose tolling. 498 U.S. at 95-96. But that does not mean that sovereign-immunity considerations are *irrelevant*. Respondent's restrictive rule violates *Irwin*'s own rationale: Whereas *Irwin* based the presumption on a "realistic assessment of legislative intent," *id.* at 95, respondent would disregard what Congress *actually* intended if the historical evidence showed that sovereign-immunity concerns shaped Congress's intent concerning a particular time bar. As this Court confirmed in *John R. Sand & Gravel*, even after *Irwin* it is proper to consider whether Congress intended to enact a jurisdictional time bar to "achieve a broader system-related goal, such as * * * limiting the scope of a governmental waiver of sovereign immuni-

---

[7] See, *e.g.*, *Lozano*, 134 S. Ct. at 1232 (citing *Irwin* for proposition that "statutory intent" governs the tolling inquiry); *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827 (observing that *Irwin*'s presumption is "premise[d]" on congressional intent) *John R. Sand & Gravel*, 552 U.S. at 137-138 (emphasizing that *Irwin* presumption can be rebutted "by demonstrating Congress's intent to the contrary").

ty." 552 U.S. at 133-134 (citing *United States* v. *Dalm*, 494 U.S. 596 (1990)).

b. Respondent likewise errs in suggesting (Br. 20) that *Irwin* requires this Court to ignore "which principles of statutory interpretation were prevalent when [the FTCA] was adopted." Respondent appears to believe that, under *Irwin*, the Court must *allow* equitable tolling under the FTCA even if Congress understood and intended the FTCA bar—in accordance with the interpretive principles that prevailed at the time—to *prohibit* such tolling. That approach is both radical and wrong.

Irwin's presumption is a tool of construction. It does not extinguish the need to analyze the statute's text, structure, history, and purpose in circumstances where there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350. Even after *Irwin*, courts may not "apply a new background rule to previously enacted legislation" if doing so would "reverse prior congressional judgments." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment).

2. In 1946 and 1966, Congress understood the FTCA time bar to be a jurisdictional limit not subject to tolling

Respondent agrees with the government on a crucial historical point: When Congress enacted and reenacted the FTCA time bar in 1946 and 1966, this Court's precedent "suggested that all statutes of limitations governing claims against the United States were jurisdictional." Resp. Br. 45; see also *id.* at 34 (noting precedent "consistently" holding "that in an action against the United States, *all* statutory re-

quirements are limitations on the government's consent to be sued, and thus jurisdictional"); U.S. Br. 29-34. In refusing to acknowledge the relevance of that precedent to the proper interpretation of the FTCA, respondent urges a construction unmoored from any "realistic assessment of legislative intent." *Irwin*, 498 U.S. at 95.

First, it was well established in 1946 that the time bars applicable to parallel claims for money damages against the United States were jurisdictional and not subject to equitable tolling. See pp. 4-8, *supra* (discussing Tucker Act cases); U.S. Br. 30-32 (discussing precedent under Tucker Act and other statutes). Most of the relevant judicial decisions emphasized sovereign-immunity considerations, and they bear directly on how Congress would have understood the parallel time bar it enacted in the FTCA.

Second, this Court's 1957 decision in *Soriano* expressly recognized that the same sovereign-immunity principles that make the time limit for filing Tucker Act claims jurisdictional also govern the time limits for filing "tort actions." 352 U.S. at 275-276; see U.S. Br. 32-34. In *Soriano*, the government argued that allowing tolling of the time bar applicable to Tucker Act claims would imply the same result with respect to the FTCA time bar. See U.S. Br. 33 & n.17. The Court agreed with that analysis and rejected the availability of tolling in *both* contexts. *Soriano*, 352 U.S. at 275-276. It justified its conclusion on the ground that "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Id.* at 276.

Respondent denies (Br. 19-20, 45-47) that *Soriano* is relevant to the FTCA, but she ignores the Court's

clear statement that Congress intended the time limits applicable to "tort actions" to be "strictly observed" and not subject to "implied" exceptions. 352 U.S. at 276. Indeed, as Members of this Court have recognized, *Soriano*'s rule against "implied" exceptions to waivers of sovereign immunity "form[s] an important part of the background of settled legal principles upon which Congress relied in enacting * * * the Tucker Act * * * [and] the [FTCA]." *West* v. *Gibson*, 527 U.S. 212, 224 (1999) (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

Third, when Congress reenacted the operative language of the FTCA in 1966, all three Branches of government had endorsed the view that the time bar was jurisdictional and not subject to tolling. Congress had previously indicated that the time bar was a jurisdictional requirement by enacting private laws expressly "conferr[ing]" "jurisdiction" on district courts to hear FTCA claims "notwithstanding" the limitations period. U.S. Br. 47 n. 27. The Department of Justice—which drafted the bill reenacting the FTCA time bar—had consistently taken the position that the bar was jurisdictional and not subject to tolling because it operated as a condition on a waiver of sovereign immunity. *Id.* at 33 & n.17, 44-45 & n.25; see *Kosak* v. *United States*, 465 U.S. 848, 855-857 (1984) (relying on views of Justice Department official who drafted FTCA provision).

In addition, this Court had indicated in *Soriano* that the FTCA time bar could not be equitably tolled. See U.S. Br. 42-43; cf. *John R. Sand & Gravel*, 552 U.S. at 136-139 (rejecting argument that *Soriano* has been overruled). That was also the uniform view of

the lower courts in 1966. See U.S. Br. 43 & n.23 (citing cases). When "[t]he Courts of Appeals and the District Courts have read the law the same way, and * * * enjoyed virtually unanimous accord," the "very strength of th[e] consensus is enough to rule out any serious claim of ambiguity" regarding Congress's intent. *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 593-594 (2004).

Against all this, respondent suggests that the FTCA permits equitable tolling because this Court *later* held that *other* statutes waiving the government's sovereign immunity could be tolled. See Br. 45-46 (citing *Irwin*, *supra*, and *Bowen* v. *City of N.Y.*, 476 U.S. 467 (1986)). But this Court's assessment of a provision's jurisdictional scope has always turned on congressional intent with respect to the particular statute at issue. See *Irwin*, 498 U.S. at 95; *Bowen*, 476 U.S. at 479-480; see also *John R. Sand & Gravel*, 552 U.S. at 137 (emphasizing that "*Irwin* dealt with a different limitations statute"). Here there is compelling textual, contextual, and historical evidence that Congress intended the FTCA time bar to incorporate the rule that the time limit for filing suit against the United States is an absolute jurisdictional requirement.[8]

---

[8] Although respondent invokes the "hornbook" principle that time bars ordinarily can be tolled (Br. 47), in fact "hornbook law" at the time recognized the important qualification that "'[g]enerally speaking the time requirement prescribed by a statute granting the right to sue the United States'" is "'jurisdictional'" and an "'indispensable condition of the liability and of the action which it permits.'" *Simon* v. *United States*, 244 F.2d 703, 705 (5th Cir. 1957) (emphasis omitted) (quoting 34 Am. Jur. *Limitation of Actions* § 7, at 17 (1941 & 1956 Supp.)).

C. Respondent's Textual Arguments Lack Merit

As our opening brief notes (Br. 36), this Court recognized in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), that the FTCA time bar's "shall be forever barred" formulation is "of a similar order" as two other statutory time limits that likewise "confine[] [a court's] review" and are therefore "jurisdictional." *Id.* at 452-453 & n.8; see also *Bowles* v. *Russell*, 551 U.S. 205, 211 (2007) (citing same language in holding that time limit in 28 U.S.C. 2107 is "jurisdictional"). Respondent ignores *Kontrick* and instead advances several textual arguments to support her claim that the FTCA time bar permits equitable tolling. None is persuasive.

1. Respondent emphasizes 28 U.S.C. 1346(b)(1), which confers jurisdiction on district courts to adjudicate FTCA claims. She observes that the heading of Chapter 85 of Title 28 of the United States Code, in which the provision appears, refers to "District Courts; Jurisdiction." And she argues that because Section 1346(b)(1) contains six requirements for establishing a district court's jurisdiction over an FTCA case—yet makes no mention of the FTCA time limit—that limit must not be jurisdictional. Br. 25, 38-39.

Respondent is mistaken. To begin with, Congress forbade courts from relying on Chapter 85's heading to interpret that provision. See Act of June 25, 1948 (1948 Act), ch. 646, § 33, 62 Stat. 991 (declaring that "[n]o inference of a legislative construction is to be drawn" from the "catchlines" used in a chapter title).

In addition, this Court has already made clear that Section 1346(b)(1) is not the *only* source of jurisdictional limits on FTCA suits. In *McNeil* v. *United States*, 508 U.S. 106 (1993), the Court strictly construed 28 U.S.C. 2675(a)'s administrative-exhaustion

requirement and affirmed the dismissal of an FTCA action—for lack of jurisdiction—where the claimant had not satisfied that requirement. 508 U.S. at 109-113.

Respondent is also wrong to invoke (Br. 39) *FDIC* v. *Meyer*, 510 U.S. 471 (1994), in asserting that a district court necessarily has jurisdiction whenever a claimant satisfies the requirements of Section 1346(b)(1). *Meyer* involved a statute providing that a federal agency's general authority to sue and be sued in its own name "shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)*." 28 U.S.C. 2679(a) (emphasis added). This Court interpreted the term "cognizable" to refer to a court's jurisdiction, and it held that the phrase "claims * * * cognizable under section 1346(b)" therefore referred to claims subject to "the jurisdictional grant provided by [Section] 1346(b)." *Meyer*, 510 U.S. at 476-477.

Crucially, however, the Court also made clear that asking "whether [a claim] is 'cognizable *under 1346(b)*'" is different from asking "whether a claim is cognizable *under the FTCA* generally." *Meyer*, 510 U.S. at 477 n.5 (citation omitted). It thus appeared to recognize that even if a claim *is* "cognizable" under Section 1346(b), it might nevertheless *not* be "cognizable" under the FTCA. *Id.* at 477. That point directly contradicts respondent's view that district courts necessarily have jurisdiction over any FTCA claim that satisfies the bare requirements of Section 1346(b)(1).

2. Respondent also emphasizes (Br. 25-28) that the FTCA time bar (1) does not explicitly refer to "jurisdiction," and (2) appears in a different chapter of Title

28 (Chapter 161) than Section 1346's jurisdictional grant (which appears in Chapter 85).

a. The lack of an express reference to jurisdiction is not significant. This Court has previously emphasized that a provision can "speak in jurisdictional terms"—and carry jurisdictional consequences—even without an express "'jurisdictional' label." *Reed*, 559 U.S. at 168; see *Henderson*, 131 S. Ct. at 1203 (noting that Congress "need not use magic words"); see also *Bowles*, 551 U.S. at 209-213 (holding time limit in 28 U.S.C. 2107(a) to be jurisdictional despite lack of reference to "jurisdiction"); *Dalm*, 494 U.S. at 601-602, 609-610 (similar). What is notable about the FTCA time bar is not the *absence* of the word "jurisdiction," but the *presence* in the original FTCA of the phrase "Every claim against the United States cognizable * * * shall be forever barred," which this Court had previously—and repeatedly—interpreted as a jurisdictional limitation in Tucker Act suits.

b. Respondent's reliance on the placement of the FTCA's limitations period in the 1948 recodification of Title 28 violates Congress's express instruction that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed." 1948 Act § 33, 62 Stat. 991. That statutory directive settles the matter—and distinguishes the FTCA time bar from deadlines the Court has deemed non-jurisdictional based on similar structural arguments. See Resp. Br. 26-27 (citing examples).

Respondent also ignores this Court's recognition that "some time limits are jurisdictional even though expressed in a separate statutory section from juris-

dictional grants." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003). The Court applied that principle in *John R. Sand & Gravel*, *Bowles*, and *Dalm*—holding in each case that a time limit was jurisdictional even though it did not appear in the statutory provision defining the "jurisdiction" of the court adjudicating suits governed by that limit.[9] Indeed, in *John R. Sand & Gravel*, the Court declined to accept the precise argument respondent makes here, in the directly parallel context of the time bar that governs Tucker Act claims, 28 U.S.C. 2501. See Pet. Br. at 19-24, *John R. Sand & Gravel*, *supra* (No. 06-1164). But if Congress did not intend Section 2501 to lose its jurisdictional character simply because, following the 1948 recodification, it is not located in the same chapter of Title 28 granting the Court of Claims jurisdiction over Tucker Act cases, there is no reason to presume any different intent with respect to the parallel FTCA time bar.

3. Even if this Court were persuaded that the FTCA's time bar is not jurisdictional, respondent cannot refute the powerful evidence that Congress nonetheless intended to preclude equitable tolling. Re-

---

[9] See *John R. Sand & Gravel*, 552 U.S. at 133-139 (holding time limit in 28 U.S.C. 2501 jurisdictional even though it appears in Chapter 165, whereas provisions defining "jurisdiction" of Court of Federal Claims (previously Court of Claims) mainly appear in Chapter 91, 28 U.S.C. 1491); *Bowles*, 551 U.S. at 209-213 (holding time limit in 28 U.S.C. 2107(a) jurisdictional even though it appears in Chapter 133, whereas provisions defining "jurisdiction" of courts of appeals appear in Chapter 83, 28 U.S.C. 1291-1296); *Dalm*, 494 U.S. at 601-602, 609-610 (holding time limit in 26 U.S.C. 6511(a) jurisdictional even though it appears in Title 26, whereas provision defining "jurisdiction" of courts over tax-refund claims appears in 28 U.S.C. 1346(a)(1)).

spondent's sole textual argument to the contrary (Br. 40-41) relies on 28 U.S.C. 1346(b)(1) and 2674, which provide that the United States is liable under the FTCA to the same extent as a private person under state tort law. But a key purpose of the FTCA limitations provision is to ensure that the deadline for filing an FTCA action will *not* mirror private-party, state-law tort suits. As this Court emphasized in *Richards* v. *United States*, 369 U.S. 1 (1962), "Congress has been specific in those instances where it intended the federal courts [applying the FTCA] to depart completely from state law." *Id.* at 14. Indeed, *Richards* identified the FTCA time bar as a prime example of a provision in which Congress "specifically" indicated that "the liability of the United States is *not* coextensive with that of a private person under state law." *Id.* at 13-14 & n.28 (emphasis added).[10] Because Section 2401(b) imposes uniform time limits that apply to all FTCA claims without regard to how private defendants are treated in analogous circumstances, Sections 1346(b)(1) and 2674 provide no support for equitable tolling.

D. Respondent Fails To Address Other Features Of The FTCA's Text And History Confirming That Tolling Is Prohibited

As discussed in our opening brief (Br. 37-41, 45-52) several other aspects of the FTCA's text and history confirm Congress's intent to enact a time bar that is

---

[10] See also, *e.g.*, *Kossick* v. *United States*, 330 F.2d 933, 935-936 (2d Cir.) (Friendly, J.) (declining to apply state law postponing accrual because "[t]he general language of [Section] 2674 must yield to the specific provisions of [Section] 2401 dealing with time limitations."), cert. denied, 379 U.S. 837 (1964).

not subject to tolling. Respondent ignores many of those points, and the few counter-arguments she does offer are not persuasive.

1. Respondent has virtually no response to the statutory text demonstrating that when Congress wanted to permit equitable tolling in closely analogous contexts, it did so expressly. For example, the time bars in the 1863 and 1911 Acts governing Tucker Act suits expressly allow tolling in cases of legal disability. U.S. Br. 37. When Congress incorporated language from those statutes into the FTCA, it omitted even those exceptions. Similarly, when Congress reenacted the FTCA time bar in 1966, it simultaneously enacted a parallel time bar—28 U.S.C. 2416—applicable to suits filed *by* the United States. U.S. Br. 46. But whereas the latter provision expressly authorized certain types of tolling, the FTCA time bar codified no similar exception. Also, in 1988, Congress added a narrow tolling provision to the FTCA, but left untouched the absolute time bar in Section 2401(b). *Id.* at 50-52. The fact that Congress explicitly authorized tolling only in carefully specified circumstances confirms its intent otherwise to prohibit such tolling.[11]

Respondent's only response concerning Section 2416 is to argue (Br. 52) that Congress's decision to enact a specific tolling provision creates a general "presumption against any non-statutory equitable tolling" because that rationale cannot "be reconciled with *Irwin*." But the point is not that Section 2416 trumps *Irwin* as a general matter, but that it confirms that

---

[11] Cf. H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947) (observing that 1948 recodification "omitted as superfluous" an express prohibition on tolling beyond specified disabilities in 28 U.S.C. 2401(a)).

when Congress reenacted the FTCA time bar—on the same day that it enacted Section 2416—it did not intend to allow equitable tolling of that bar. And although respondent attempts (Br. 52-54) to undermine the significance of the 1988 amendment to 28 U.S.C. 2679(d)(2) by pointing to the Westfall Act's general purpose of protecting federal employees, the purpose of that specific provision was to make tolling available for plaintiffs who might be adversely affected by the Act's new procedure for substituting an FTCA claim against the United States for a suit against an individual employee.

2. Respondent likewise gives short shrift to the history of the FTCA. In the deliberations that led up to the original FTCA, Congress rejected various proposals to allow tolling for "reasonable cause" or in cases of disability. U.S. Br. 38-39. Later—in 1949, 1965, 1967, 1969, 1971, 1986, and 1989—Congress rejected proposals to amend the FTCA to authorize equitable tolling in various circumstances. *Id.* at 41, 49-50 & n.30. Moreover, when Congress did pass legislation to address potential hardships associated with the FTCA time bar, it did not embrace the broad tolling rule respondent urges here. Instead, in 1949 Congress extended the one-year suit filing deadline by an additional year, and in 1988 it authorized a narrow exception to the time bar's otherwise-strict administrative-presentment requirement in response to the new procedures established by the Westfall Act. *Id.* at 41, 50-52.

Respondent broadly denies (Br. 41-42) that the FTCA's history is relevant to ascertaining Congress's intent. But this Court has regularly consulted that history—including the history of the unenacted tort-

claims bills considered between 1925 and 1946—in prior FTCA cases, and there is no reason to depart from that practice here. See generally *United States* v. *Muniz*, 374 U.S. 150, 153-158 (1963); *Dalehite* v. *United States*, 346 U.S. 15, 24-30, 33-34 (1953); see also *Reed*, 559 U.S. at 166 (emphasizing importance of "context" and "historical treatment" in assessing whether provision is jurisdictional). The FTCA's history is an important tool for interpreting the legally operative text of the time bar, for understanding the background principles against which Congress actually legislated, and thus for discerning "Congress' likely meaning." *John R. Sand & Gravel*, 552 U.S. at 137-138.

Respondent's only real effort to engage with the FTCA's legislative history is her assertion (Br. 51 n.29) that one reason that Congress extended the suit-filing deadline in 1949 was to more closely track similar federal and state statutes. That does not change the fact that some in Congress also indicated that the existing one-year period was unfair in certain "hardship" cases where the claimant had a "reasonable excuse" for not observing the time limit. U.S. Br. 41. That concern makes sense only if Congress did *not* presume that the original time bar would have implicitly authorized equitable tolling in such circumstances by its own force.

3. Finally, respondent simply ignores the numerous private laws that Congress enacted from the 1950s through the 1980s expressly conferring "jurisdiction" on district courts to hear FTCA claims "notwithstanding" a claimant's failure to comply with the time bar. See U.S. Br. 46-49 (discussing private laws in detail). Those laws confirm that Congress understood the

FTCA time bar to be a jurisdictional requirement not subject to tolling. *Ibid.*

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2014

AMICUS CURIAE BRIEF

RECORD
\ AND
BRIEFS

Nos. 13-1074, 13-1075

Supreme Court, U.S.
FILED
NOV 12 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

KWAI FUN WONG, CONSERVATOR

Respondent.

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

Lisa Blue Baron
AMERICAN ASSOCIATION FOR JUSTICE
777 6th St. NW
Suite 200
Washington, DC 20001
(202) 965-3500
President, American Association for Justice

Jeffrey R. White
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th St. NW, Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com
Attorney for Amicus Curiae American Association for Justice

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

INTRODUCTION 5

I. THE TEXT OF THE FEDERAL TORT CLAIMS ACT SUPPORTS APPLICATION OF EQUITABLE TOLLING OF THE TIME LIMITS IN 28 U.S.C. § 2401(b). 8

A. The Limitations Periods in 28 U.S.C. § 2401(b) Are Presumed to be Subject to Equitable Tolling in the Absence of a Clear Statement by Congress to the Contrary. 9

B. Consent to Liability "To the Same Extent As a Private Individual" Indicates Congressional Intent That Time Limitations Be Subject to Equitable Tolling 13

C. Statutory Command That Claims Not Filed Within Limitations Periods Be "Forever Barred" Does Not Prohibit Courts From

Equitably Tolling Time Limits in Appropriate Cases. 14

II. APPLICATION OF EQUITABLE TOLLING TO FTCA TIME LIMITATIONS IS CONSISTENT WITH THE CONGRESS'S COMPENSATORY PURPOSE. 18

III. DISTRICT COURTS SHOULD BE AUTHORIZED TO USE EQUITABLE TOLLING IN APPRORIATE CASES TO AVOID DEPRIVATIONS OF CLAIMANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS. 23

A. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to a Hearing on Their FTCA Claims for Reasons Beyond Their Control. 23

B. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to Access to Courts Where Government Actions Resulted in Claimant's Failure to Comply With FTCA Time Limits. 28

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 17

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 12

Arteaga v. United States, 711 F.3d 828 (7th Cir. 2013) 8, 16, 20

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 30

Benge v. *United States*, 17 F.3d 1286 (10th Cir. 1994) 8

Christopher v. Harbury, 536 U.S. 403 (2002) 27, 29, 30

Cohens v. Virginia, 19 U.S. 264 (1821) 6

Dalehite v. United States, 346 U.S. 15 (1953) 18, 19

Dolan v. United States Postal Service, 546 U.S. 481 (2006) 19

Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005) 9

Franconia Associates v. United States, 536 U.S. 129 (2002) 13

Glarner v. *United States*, 30 F.3d 697 (6th Cir. 1994) 8

Gonzalez v. Thaler, 132 S. Ct. 641 (2012) 11

Henderson v. Shinseki, 131 S. Ct. 1197 (2011) 11, 12, 14

Holland v. Florida, 560 U.S. 631 (2010) 11

Indian Towing Co. v. United States, 350 U.S. 61 (1955) 19

Irwin v. Veterans Administration, 498 U.S. 89 (1990) 10

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 13, 16, 17

Kendall v. United States, 107 U.S. 123 (1883) 16

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 17

Kokotis v. United States Postal Service, 223 F.3d 275 (4th Cir. 2000) 8

Kontrick v. Ryan, 540 U.S. 443 (2004) 11, 14

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 25, 26, 27

Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014) 15

Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012) 28

Perez v. United States, 167 F.3d 913 (5th Cir. 1999) 8, 15

Rayonier Inc. v. United States, 352 U.S. 315 (1957) 18

Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) 16

Richards v. Jefferson County, Alabama, 517 U.S. 793 (1996) 26

Rotella v. Wood, 528 U.S. 549 (2000) 15

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) 30

Sanchez v. United States, 740 F.3d 47 (1st Cir. 2014) 8

Santos ex rel. Beato v. United States, 559 F.3d 189 (3d Cir. 2009) 8, 22

Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817 (2013) 12

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 26

Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998) 11

Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998) 31

T.L. v. United States, 443 F.3d 956 (8th Cir. 2006) 8

Union Pacific Railroad Co. v. Locomotive Engineers and Trainmen General

Committee of Adjustment, Central Region, 558 U.S. 67 (2009) 14

United States v. Dalm, 494 U.S. 596 (1990) 6

United States v. Kubrick, 444 U.S. 111 (1979) 15

United States v. Mitchell, 463 U.S. 206 (1983) 5, 6

Valdez ex rel. Donely v. United States, 415 F. Supp. 2d 345 (S.D.N.Y. 2006), *vacated*, 518 F.3d 173 (2d Cir. 2008) 20

Valdez ex rel. Donely v. United States, 518 F.3d 173 (2d Cir. 2008) 21

Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013), *cert. granted sub nom., United States v. Wong*, 134 S. Ct. 2873 (2014) 8, 24, 25

Young v. United States, 535 U.S. 43 (2002) 13

Zimmerman Brush Co. v. Fair Employment Practices Commission, 411 N.E.2d 277 (Ill. 1980) 26

Statutes

15 U.S.C. § 15b 17

18 U.S.C. § 1964 17

28 U.S.C. § 1346(b) 7

28 U.S.C. § 1346(b)(1) 12, 13

28 U.S.C. § 2401(b) ..... *passim*

28 U.S.C. § 2674 ..... 7, 13

42 U.S.C. § 1983 30

42 U.S.C. § 2000e-16(c) 10

Ill. Rev. Stat., ch. 48, ¶¶ 851 *et seq.* 25

Other Authorities

Bourne, Richard W., *A Day Late, A Dollar Short: Opening A Governmental Snare Which Tricks Poor Victims Out of Medical Malpractice Claims*, 62 U. Pitt. L. Rev. 87 (2000) 20

Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862) 5

Figley, Paul F. & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207 (2009) 6

Higginbotham, Laurie & Jamal Alsaffar, *Navigating The Federal Tort Claims Act*, 47 Trial 14 (2011) 6

Richman, Joe, *The Day A Bomber Hit The Empire State Building, NPR All Things Considered*, July 28, 2008 18

Sisk, Gregory C., *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245 (2014) 7, 16

Sisk, Greogry C., *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517 (2008) 18

Rules

S. Ct. R. 37.6 2

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of amicus curiae briefs have been filed with this Court.

The American Association for Justice is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. Many American Association for Justice members represent people who have been wrongfully injured, including those who have been injured by negligent employees of the Federal Government and who must seek compensation under the Federal Tort Claims Act.

American Association for Justice members are keenly aware of the importance of keeping the doors of our courthouses open for those who seek legal redress. Courts, including federal courts, have done so, using their inherent equitable powers. Federal courts of appeals have overwhelmingly held that courts may equitably toll the FTCA's time limitations in appropriate cases. The American Association for Justice is concerned that if the Government's position is adopted in this case—prohibiting federal courts from tolling those time limits in cases where the plaintiff has diligently pursued her cause of action but has failed to meet those deadlines for reasons beyond her control—those courthouse doors will be shut against claimants whom Congress intended to have their day in court. To protect the rights of those

persons, the American Association for Justice submits this amicus curiae brief.[1]

SUMMARY OF ARGUMENT

1. The question presented in this case, whether the time limitations imposed on plaintiffs by the Federal Tort Claims Act ("FTCA") may be equitably tolled, has been answered in the affirmative by all federal circuit courts of appeals to have addressed the question. The Government has provided this Court with no reason to reject that considered construction.

No one disputes that waiver of sovereign immunity and the scope of that waiver is a matter of congressional intent. But that intent cannot be reliably ascertained by examining this Court's decisions concerning other statutes reaching back to the 19th Century, or by looking to inconclusive legislative history or the bills Congress did not pass. The intent of Congress is clear from the text of the statute itself.

This Court set forth a bright-line rule for determining whether time limitations on Congress-created causes of action preclude courts from making use of equitable tolling: It is presumed that Congress intended to permit courts to equitably toll statutes of limitations unless Congress has issued a clear statement to the contrary. The Government's

---

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation of submission of this brief.

attempts to label the FTCA's time limitations as "jurisdictional" does not rebut this presumption. Indeed, this Court in recent cases has distinguished between those statutory requirements that are truly jurisdictional, in the sense of depriving the federal court of its adjudicatory power, and those that are mere "claims processing rules," which may be tolled. Generally, this Court has found that time limitations on the filing of claims against the Federal Government belong in the second category. The plain text of the FTCA indicates that its time limits are claims-processing rules as well.

Perhaps the most important textual indicator of congressional intent is the fact that Congress waived sovereign immunity and vested federal courts with the jurisdiction to hold the United States liable in the same manner and to the same extent as a private individual. Statutes of limitations in causes of action against private individuals are usually subject to equitable tolling. Congress intended the limitations on the national government's liability to be subject to the same equitable considerations.

Nor does the statutory phrase "shall be forever barred" rebut the presumption in favor of equitable tolling. That language, though emphatic, is not itself jurisdictional. Its plain meaning is that causes of action that have expired due to the time limits shall not be resuscitated. Equitable tolling, on the other hand, suspends the time limitation and prevents the cause of action from expiring. This Court has held that the same phrase used in the Tucker Act is jurisdictional and not amenable to equitable tolling. But that decision was based on the principle of *stare decisis*, not on the plain meaning of the statutory text. Moreover, there are other statutes that also employ

the "shall be forever barred" phraseology which this Court has held are subject to equitable tolling.

2. The interpretation of the FTCA time limits adopted by the lower court and the overwhelming majority of other federal courts of appeals is also consistent with the compensatory purpose of the FTCA. Congress enacted the statute, after decades of consideration, following a tragic aircraft accident that left families without legal recourse.

In addition, prohibiting courts from using their equitable tolling authority would allow the Government to take advantage of injured victims, including children, who are vulnerable to unexpected traps in FTCA law. One example is a provision under which private physicians employed at private medical facilities that receive federal funds may be deemed to be Federal Government employees. Courts have tolled the FTCA deadlines to prevent unfairness in such instances. It is consistent with Congress's compensatory purpose that courts exercise their equitable powers to avoid harsh results.

3. Federal courts' judicious use of equitable tolling of statutes of limitations also prevents deprivations of plaintiffs' constitutional rights to due process and access to the courts. In one case before this Court, the plaintiff was deprived of her cause of action, not because she lacked diligence, but because of shortcomings by the district court and magistrate system in processing her motions. This Court has previously held in similar circumstances that such a deprivation violated a plaintiff's right to due process.

In the other case before this Court, the plaintiff was prevented from timely filing her FTCA claim by the actions of a federal agency that concealed the Federal Government's role in causing a highway fatality. This Court has previously held that such concealment may amount to violation of plaintiff's constitutional right of access to the courts. In such cases, federal courts should be authorized to make use of their equitable power to toll the statutory time limits and thereby avoid deprivations of claimants' fundamental constitutional rights.

ARGUMENT

INTRODUCTION

President Abraham Lincoln famously declared, it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." *United States v. Mitchell*, 463 U.S. 206, 213 (1983) (quoting Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862)). It would be 84 years before Congress would shoulder that responsibility to render justice to those who have been injured because of the negligence of Federal Government employees by enacting the Federal Tort Claims Act.

The FTCA offers fair compensation for those who might be injured due to the negligence of government employees, including "tens of millions of Americans [who] receive medical care at military base facilities, U.S. Department of Veterans Affairs (VA) hospitals, and federally funded clinics," as well as the millions of Americans who "share the road every day with postal trucks and military vehicles." Laurie Higginbotham & Jamal Alsaffar, *Navigating The*

Federal Tort Claims Act, 47 Trial 14, 14 (2011). But the FTCA "also presents the challenge of satisfying myriad federal and state law requirements that threaten to destroy [a plaintiff's] chances of recovery." *Id.* One such challenge is compliance with the Act's time limits on presenting claims to the appropriate federal agency and on filing in federal court.

The doctrine of sovereign immunity is firmly rooted in American jurisprudence. *See Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.") Because any compensation for harm caused by government employees must necessarily be drawn from the Treasury, the authority to waive immunity is constitutionally placed in the hands of Congress. *See* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1264 (2009). As this Court has made clear, "[i]f any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress." *United States v. Dalm*, 494 U.S. 596, 610 (1990).

The Federal Government was never wholly unaccountable for wrongs to its citizens. The First Amendment guaranteed to Americans the right to petition their Government for redress directly through private bills in Congress. *Mitchell*, 463 U.S. at 212-213 (1983). In 1855 Congress established the Court of Claims and over the course of time enacted "a broad tapestry of authorized judicial actions against the federal Government." Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245,

1252-53 (2014). Among them is the Federal Tort Claims Act, which states:

> The United States shall be liable [for tort claims] *in the same manner and to the same extent as a private individual* under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674 (emphasis added). Congress provided that the federal courts

> [S]hall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances *where the United States, if a private person, would be liable* to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (emphasis added). In a separate section, Congress also provided:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered

> mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

The question presented in this case—whether the time limitations prescribed in 28 U.S.C. § 2401(b) are subject to equitable tolling—is not an unsettled one. Nine United States courts of appeals have held or assumed that those limits may be equitably tolled. *See Sanchez v. United States*, 740 F.3d 47, 54 (1st Cir. 2014); *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194 (3d Cir. 2009); *Kokotis v. U.S. Postal Serv.*, 223 F.3d 275, 280-81 (4th Cir. 2000); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999); *Glarner* v. *United States*, 30 F.3d 697, 700-01 (6th Cir. 1994); *Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013); *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006); *Wong v. Beebe*, 732 F.3d 1030, 1046 (9th Cir. 2013), *cert. granted sub nom.*, *United States v. Wong*, 134 S. Ct. 2873 (2014); *Benge* v. *United States*, 17 F.3d 1286, 1288 (10th Cir. 1994). No circuit holds that federal courts lack jurisdiction to toll the FTCA time limitations where equity may require. The American Association for Justice respectfully submits that the Government has advanced no persuasive rationale for overturning that body of federal precedent.

I. THE TEXT OF THE FEDERAL TORT CLAIMS ACT SUPPORTS APPLICATION OF EQUITABLE TOLLING OF THE TIME LIMITS IN 28 U.S.C. § 2401(b).

The Government's position may be put succinctly: The statutory time limits are jurisdictional by congressional design, they are to be strictly

interpreted, and they do not permit equitable tolling. *See* Pet'r's Br.17, *United States v. Wong*, No. 13-1074 (U.S. Sept. 9, 2014). The Government correctly states whether federal courts may toll the Act's time limits for equitable reasons turns on the intent of Congress. *Id.* at 18. However, the Government devotes a large part of its argument to an attempt to establish congressional intent through examination of Congress's use of similar language in statutes enacted in 1863 and 1911, *see id.* at 20-28. The Government also looks for clues to congressional intent in other pre-FTCA statutes, *see id.* at 31-35; in the FTCA's inconclusive legislative history, *see id.* at 36-39; in the subsequent actions of Congress, *see id.* at 40-49; and in bills that Congress did not enact. *See id.* at 49-50.

Of course, as this Court has "repeatedly held, the authoritative statement [of Congress's intent] is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The American Association for Justice submits that the statutory text in this case gives no indication, much less a "clear statement," that Congress intended to prohibit federal courts from equitably tolling the FTCA time limitations in appropriate cases.

A. The Limitations Periods in 28 U.S.C. § 2401(b) Are Presumed to be Subject to Equitable Tolling in the Absence of a Clear Statement by Congress to the Contrary.

The task of ascertaining whether Congress intended to preclude federal courts from tolling the time limitations in 28 U.S.C. § 2401(b) begins with

this Court's decision in *Irwin v. Veterans Administration*, 498 U.S. 89 (1990).

Irwin's employment discrimination suit under Title VII of the Civil Rights Act of 1964 was dismissed for non-compliance with 42 U.S.C. § 2000e-16(c), which allows an individual a limited time to commence suit after receiving a right-to-sue letter from the Equal Employment Opportunity Commission. This Court granted certiorari "to resolve the Circuit conflict over whether late-filed claims are jurisdictionally barred." 498 U.S. at 92. This Court concluded that statutes of limitations in suits against the Government are not jurisdictional and may be subject to equitable tolling.

Chief Justice Rehnquist, writing for a unanimous Court, explained that "[t]ime requirements in lawsuits between private litigants are customarily subject to equitable tolling." *Id.* at 95. In addition, although waivers of sovereign immunity "must be unequivocally expressed, . . . [o]nce Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.*

This Court therefore announced as a "general rule to govern the applicability of equitable tolling in suits against the Government," that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court viewed this general rule as "likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id.* at

95. This Court has also stated that "the presumption's strength is reinforced by the fact" that the Court will "not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (internal quotations and citations omitted).

The Government's heavy insistence that the FTCA time limits are "jurisdictional," *see* Pet'r's Br. 19, and its reliance on a line of decisions reaching back to the 19th Century in which this Court attached the jurisdictional label to time limitations, *see id.* at 22-24, essentially devalues the *Irwin* presumption.

Recognizing that "jurisdiction" has been a "word of many, too many, meanings," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998), this Court has "tried in recent cases to bring some discipline to the use" of the term. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). Not all statutory requirements that courts in the past typed as "jurisdictional" were truly essential to the court's power to decide the case. In recent cases, this Court has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). "Claim-processing rules," the Court has explained, merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203. Therefore,

> To ward off profligate use of the term "jurisdiction," [this Court has] adopted a

> "readily administrable bright line" for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has "clearly state[d]" that the rule is jurisdictional; absent such a clear statement, we have cautioned, "courts should treat the restriction as nonjurisdictional in character."

Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)).

In this case, the Act contains no clear statement by Congress that non-compliance with the six-month and two-year deadlines deprives the court of adjudicatory power or that Congress intended to prohibit courts from invoking the equitable tolling doctrine. 28 U.S.C. § 2401(b) is addressed to claimants, requiring them to take certain procedural steps at specified times. It "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [court]." *Henderson*, 131 S. Ct. at 1204. Moreover, the section in which Congress confers jurisdiction on federal courts to decide tort claims is 28 U.S.C. § 1346(b)(1), an entirely separate section which does not reference § 2401(b) or time limits. This Court has instead stated that "filing deadlines ordinarily are not jurisdictional; indeed, we have described them as 'quintessential claim-processing rules.'" *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (quoting *Henderson*, 131 S. Ct. at 1203). There is no clear statement in the statute that Congress intended otherwise in this instance.

B. Consent to Liability "To the Same Extent As a Private Individual" Indicates Congressional Intent That Time Limitations Be Subject to Equitable Tolling.

Under the FTCA, "[t]he United States [is] liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Likewise, section 1346(b)(1) grants the district courts exclusive jurisdiction over tort actions against the Government "under circumstances where the United States, if a private person, would be liable." *Id.* at § 1346(b)(1). As Justice Ginsberg, writing for the Court, has noted, "[o]nce the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity." *Franconia Assoc. v. United States*, 536 U.S. 129, 141 (2002).

The language used in the statute clearly indicates Congress's intent that equitable tolling apply to the limitations periods. This Court has stated, "It is hornbook law that limitations periods are customarily subject to equitable tolling . . . . Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted); *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (statutes of limitations "typically permit courts to toll the limitations period in light of special equitable considerations").

C. Statutory Command That Claims Not Filed Within Limitations Periods Be "Forever Barred" Does Not Prohibit Courts From Equitably Tolling Time Limits in Appropriate Cases.

The FTCA states that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless [a civil] action is begun within six months after . . . denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

The Government places a great deal of emphasis on Congress's use of the phrase "shall be forever barred." The Government contends that the "unusually emphatic form" of this phrase, *see* Pet'r's Br. 35, and the fact that the same phrase appeared in the 1863 and 1911 Acts, governing Tucker Act suits in the Court of Claims, *see* Pet'r's Br. 22 & n.7, demonstrate that the FTCA's time limits have "jurisdictional effect" and are "not subject to equitable tolling." *Id.* at 28.

This Court has explained that not all "'mandatory prescriptions, *however emphatic*, are . . properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pacific R.R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. 67, 81 (2009)) (emphasis added). Courts, in the past, "including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." *Kontrick*, 540 U.S. at 454. The

Government's efforts to affix the label "jurisdictional" to the Act's time limits do not make a convincing argument.

More importantly, the plain meaning of the phrase "forever barred" is not inconsistent with the doctrine of equitable tolling. A fair reading of § 2401(b) is that any claim that has expired shall not be resuscitated. The focus of the phrase is the end point of the limitations period. The provision does not preclude delaying the start of the limitations period by invoking the discovery rule. *See United States v. Kubrick*, 444 U.S. 111, 123-24 (1979) (discovery rule of accrual applicable in FTCA actions). Nor should it preclude suspending the running of the time limit by equitable tolling, which "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014). In short, as Judge Patrick E. Higginbotham has remarked, equitable tolling "does not resuscitate stale claims, but rather prevents them from becoming stale in the first place." *Perez*, 167 F.3d at 916.

The Act's "emphatic" tone, therefore, does not indicate any congressional intent to treat the limitations periods any differently than other federal statutes of limitations, which "are generally subject to equitable principles of tolling." *Rotella v. Wood*, 528 U.S. 549, 560 (2000).

The Government makes much of the fact that Congress also used the phrase "shall be forever barred" in the Tucker Act, which, this Court held in *John R. Sand & Gravel Co. v. United States*, 552 U.S.

130 (2008), is not subject to equitable tolling. *See* Pet'r's Br. 19-21 & 28. However, as Judge Posner has pointed out, this Court's "opinion in *John R. Sand & Gravel* actually reaffirms the presumption that equitable tolling applies to statutes of limitations in suits against the government, while emphasizing that the presumption is rebuttable." *Arteaga*, 711 F.3d at 833.

Justice Breyer, writing for the majority in *John R. Sand & Gravel*, made clear that the Court's decision regarding the "jurisdictional" status of the Tucker Act time limit was not premised on a reading of the statutory text, but on "[b]asic principles of *stare decisis*" and the line of this Court's prior Tucker Act decisions, dating from the 19th Century. 552 U.S. at 139; *id.* at 134-35 (discussing cases, beginning with *Kendall v. United States*, 107 U.S. 123 (1883), in which the Court denied equitable tolling to a former employee of the Confederate States of America). *See also* Pet'r's Br. 22-24 (discussing the same cases). As Justice Ginsberg later pointed out, the Court decided *John R. Sand & Gravel* "largely on *stare decisis* grounds" and "relied on longstanding decisions of *this* Court typing the relevant prescriptions 'jurisdictional.'" *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173-74 (2010) (Ginsburg, J. concurring) (emphasis in original). *See also* Sisk, *supra*, at 1279 (The Court's decision in *John R. Sand & Gravel* "was premised squarely on the principle of stare decisis" and "adhered to a nineteenth century line of cases that regarded this particular statute of limitations as jurisdictional.").

Those concerns are absent here. This Court has not previously addressed whether Congress intended the FTCA time limits to be a "more absolute" type of

jurisdictional limitation that does not permit equitable tolling. *John R. Sand & Gravel*, 552 U.S. at 134. There is no "long line of this Court's decisions left undisturbed by Congress" from which, as the Government suggests, Pet'r's Br. 21, such an intent might be gleaned.

In any event, this Court has found congressional intent to permit equitable tolling in other similarly worded federal statutes of limitations. A provision of the Racketeer-Influenced Corrupt Organizations ("RICO") allows the victims of criminal enterprises to bring a civil action for damages. 18 U.S.C. § 1964. Civil RICO actions are governed by the four-year statute of limitations set out in the Clayton Act, 15 U.S.C. § 15b. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). That section provides that "[a]ny action to enforce a cause of action under [civil RICO] *shall be forever barred* unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (emphasis added). This Court has held that this limitation is subject to equitable tolling where the plaintiff has exercised "reasonable diligence." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-96 (1997).

Thus, the phrase "shall be forever barred" does not amount to a "clear statement" that a claimant's noncompliance with FTCA's time limits deprives the court of jurisdiction. The Government has failed to rebut the presumption that Congress intended to allow courts to apply equitable tolling in appropriate cases.

II. APPLICATION OF EQUITABLE TOLLING TO FTCA TIME LIMITATIONS IS CONSISTENT WITH THE CONGRESS'S COMPENSATORY PURPOSE.

The compensatory purpose of the FTCA is not disputed. On July 28, 1945, a fighter pilot lost his bearings in heavy fog and slammed his B-25 bomber into the Empire State Building. The plane ripped through the 78th and 80th floors, where the offices of the National Catholic Welfare Council were located, causing 14 deaths. Joe Richman, *The Day A Bomber Hit The Empire State Building*, *NPR All Things Considered*, July 28, 2008, *available at*, http://www.npr.org/templates/story/story.php?storyId=92987873.

That tragedy was a catalyst for enactment of legislation waiving the sovereign immunity of the Federal Government for tortious injury, which had been languishing in Congress for two decades. The Federal Tort Claims Act of 1946, was made retroactive to 1945 in order to allow victims of the B-25 crash to seek recovery. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 536 (2008). The statute represented a "legislative pledge of relief to those harmed by their government." *Id.* at 522.

This Court has described the Act as "the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953), *overruled in part on other grounds by*, *Rayonier Inc. v. United States*, 352 U.S. 315 (1957). The Court also noted that the FTCA "was Congress's solution" to the

"notoriously clumsy" device of petitioning Congress for private bills, by "affording instead *easy and simple access to the federal courts* for torts within its scope." *Id.* at 24-25 (emphasis added).

This Court has declared:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.

Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955).

This Court has stated it would not undermine the compensatory purpose of Congress by acting "as a self-constituted guardian of the Treasury [and] import[ing] immunity back into a statute designed to limit it." *Id.* at 69. *See also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (warning that "unduly generous interpretations of the exceptions [to FTCA liability] run the risk of defeating the central purpose of the statute") (internal quotation omitted).

It should also be kept in mind that the plaintiffs in personal injury actions against the government are often vulnerable victims. Congress's aim of providing easy and simple access to the federal courts for redress is undermined when the Government itself has a hand, intentionally or not, in placing impediments in their path to the courthouse.

One recurring instance involves an individual who is harmed by medical malpractice by a private physician at a private clinic where, unbeknownst to the patient or to the public at large, medical personnel are deemed to be federal government employees for purposes of the FTCA because the clinic receives federal funds.[2] Actions for damages caused by such physicians must be brought under the FTCA against the United States in federal court and subject to the FTCA's time limitations. *See Arteaga*, 711 F.3d at 830. Several courts have pointedly highlighted the inequity of the Government's attempts to take advantage of patients' understandable ignorance of this arrangement. As the Second Circuit stated:

> Patients receiving such treatment are not aware, because they are never told or put on any notice, that the clinics they attend are government-funded or that doctors treating them are government employees. Such an omission does not

---

[2] "Pursuant to the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. § 233(g)-(n) (the Act), the employees of any federally supported health center are deemed to be employees of the United States for purposes of bringing civil actions against them for damages resulting from the performance of medical, surgical, dental or related functions." *Valdez ex rel. Donely v. United States*, 415 F. Supp. 2d 345, 347 (S.D.N.Y. 2006), *vacated*, 518 F.3d 173 (2d Cir. 2008). *See also* Richard W. Bourne, *A Day Late, A Dollar Short: Opening A Governmental Snare Which Tricks Poor Victims Out of Medical Malpractice Claims*, 62 U. Pitt. L. Rev. 87, 88-89 (2000) (While the "goal of this legislation is laudable by not requiring service providers to carry and pay for malpractice insurance, the legislation hurts poor consumers of federally subsidized health care services, the very populations the federal program was meant to help.").

> rise to the level of fraud. Nevertheless, by not formulating a regulation that would require notice to a patient that the doctor rendering service to him is an employee of the United States, the Department of Health & Human Services has created a potential statute of limitations trap in states . . . [that] may provide a longer period of time than the FTCA to file a complaint. The number of cases in which the United States has sought to take advantage of this trap suggests that it is aware of the consequences of its failure to disclose the material facts of federal employment by doctors who might reasonably be viewed as private practitioners.

Valdez ex rel. Donely v. United States, 518 F.3d 173, 183 (2d Cir. 2008).

The Third Circuit has likewise noted the unfairness of dismissing a medical negligence claim as untimely where the injured victim is a child and plaintiff and plaintiff's counsel understandably rely on state laws that toll the statute of limitations for minors:

> We make one final observation about the inequity of the Government's position that should be apparent to all. The only reason that Santos has been barred from bringing her action is that at the time of her injury she was a minor, so her counsel understandably believed that the Pennsylvania statutory tolling rule protecting minors applied in her case. . . .

> Thus, the Government is contending for a result likely to prejudice the weakest and most vulnerable members of our society . . . There is no escape from the reality that the statute of limitations trap to which the court referred in *Valdez* is a perfect vehicle to ensnare children.

Santos ex rel. Beato, 559 F.3d at 203-04.

Congress did not intend the statutory protection extended to physicians to leave those injured by medical negligence without remedy. Indeed, Congress's purpose in waiving the doctrine of sovereign immunity to tort claims was to afford legitimate claimants their day in court. The Government concedes that dismissal of a plaintiff's cause of action in such circumstances is "harsh." Pet'r's Br. 39. The Government contends, however, that "Congress . . . expected that claimants in such cases would seek enactment of a private law—not that courts would grant equitable tolling." *Id.* It makes little sense that Congress would have replaced the widely criticized system of private bills to compensate tort claims with a judicial remedy, *except* for those claimants whose unfair treatment the courts have equitable powers to address.

III. DISTRICT COURTS SHOULD BE AUTHORIZED TO USE EQUITABLE TOLLING IN APPRORIATE CASES TO AVOID DEPRIVATIONS OF CLAIMANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS.

A. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to a Hearing on Their FTCA Claims for Reasons Beyond Their Control.

The cases before this Court present compelling examples of the federal courts' use of traditional equitable tolling to prevent not only inequitable, but unconstitutional outcomes. *United States v. Wong*, No. 13-1074, is an example of a claim that was diligently prosecuted by the plaintiff, but was rendered untimely under 28 U.S.C. § 2401(b) due to circumstances beyond her control.

Ms. Wong filed her administrative claim with the Immigration and Naturalization Service ("INS") on May 18, 2001, seeking damages arising out of conditions of her detention by the agency. The INS should have responded no later than November 19. Anticipating denial, Plaintiff moved for leave to file a civil action by way of an amended complaint containing an FTCA claim "on or after November 20," the first day she was permitted to file. The INS missed its deadline, but denied Wong's claim on December 3, which restarted her six-month period in which to file her civil action. On April 5, 2002, the magistrate judge issued a recommendation to the district court that Wong's motion be granted and that she be permitted

to file her amended complaint. However, the district court did not issue an order adopting that recommendation until June 25, three weeks after the six-month filing deadline had expired. Wong thereafter filed her amended complaint, and the district court granted the Government's motion to dismiss the complaint as untimely. *Wong v. Beebe*, 732 F.3d 1030, 1033-34 (9th Cir. 2013), *cert. granted sub nom.*, *United States v. Wong*, 134 S. Ct. 2873 (2014).

As the court of appeals was careful to emphasize, this result "was not the consequence of any fault or lack of due diligence on Wong's part. If anything, Wong took special care in exercising due diligence." *Id.* at 1052. The court continued,

> As the Magistrate Judge noted, it was "due solely to the delay inherent in the Magistrate Judge system" that no action was taken with respect to [Wong's] requests until the six-month limitations period had already run. Moreover, by informing the parties and the court of her desire to file an FTCA claim well before the filing deadline and requesting leave to do so, Wong fulfilled the notice concern that partially underlies limitations statutes. . . . Wong was entitled to expect a timely ruling on her request to amend, which was made with a great deal of time to spare. . . . In short, Wong's claim was rendered untimely because of external circumstances beyond her control.

Id. at 1052-53. In his separate opinion, Chief Judge Kozinski added by way of explanation that "federal

district courts are chronically overworked, facing volumes of motions and briefing every day. It thus took the court more than seven months to act on this routine motion—a delay Wong didn't cause and couldn't have foreseen." *Id.* at 1054 (Kozinski, C.J., concurring).

Where Congress has established a right and a procedure for vindicating that right, courts may not sit passively while systemic deficiencies rob claimants of the ability to make use of that procedure. This Court so held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Logan alleged that he was fired because of his physical disability in violation of the Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48, ¶¶ 851 *et seq.*, which also established a comprehensive scheme for adjudicating such claims. When an employee has filed a charge of unlawful discrimination, the Act required the Illinois Fair Employment Practices Commission to convene a factfinding conference within 120 days to obtain evidence, ascertain the position of the parties, and explore the possibility of negotiated settlement. The findings may result in dismissal of the charge or more formal adversary proceedings against the employer. The complainant was entitled to full review by the Commission and, thereafter, to judicial review. *See* 455 U.S. at 424-25.

In Logan's case, however, the Commission failed to schedule a conference until after 120 days had elapsed. The Illinois Supreme Court held that the time limitation was mandatory and failure to comply with the deadline deprived the Commission of jurisdiction to hear Logan's case. *Id.* at 427;

Zimmerman Brush Co. v. Fair Employment Practices Comm'n, 411 N.E.2d 277, 281 (Ill. 1980).

This Court reversed. The Court began by recognizing that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan*, 455 U.S. at 428. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as plaintiffs attempting to redress grievances." *Id.* at 429; *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 804 (1996). In particular, the due process clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." 455 U.S. at 429 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)).

This Court explained that, while the legislature may create statutory rights and may establish reasonable rules for pursuing those rights, the due process clause imposes federal minimum procedural requirements of fairness. *Id.* at 432. "Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest." *Id.* "To put it as plainly as possible," the Court declared, "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* at 434. The Court took care to note that due process did not require a hearing on the merits of a claim "when the *claimant* fails to comply with a reasonable procedural requirement, or fails to file a timely charge." *Id.* at 434 n.7. But in Logan's case, "it is the *state system itself* that destroys a complainant's property interest, by operation of law, whenever the Commission fails to

convene a timely conference." *Id.* at 436. (emphasis added).[3]

The American Association for Justice submits that the court's authority to equitably toll the time limitations serves as a proper procedural safeguard to prevent such a deprivation of plaintiff's due process rights. Equitable tolling would have prevented just such a deprivation in *Logan*. As Justice Powell pointed out, "One would have expected this sort of negligence by the State to toll the statutory period within which a hearing must be held. The Supreme Court of Illinois, however, *read the statutory terms as mandatory and jurisdictional*." *Id.* at 443 (Powell, J., concurring) (emphasis added).

The American Association for Justice submits that a construction of 28 U.S.C. § 2401(b) that prohibits federal courts from making use of equitable tolling where a plaintiff has been diligent in pursuing her rights and has been deprived of a hearing for reasons that are not within her control would allow results that, as this Court found in *Logan*, violate due process.

---

[3] This Court has also held that the constitutional right of access to the courts is implicated where "systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits." *Christopher v. Harbury*, 536 U.S. 403, 413 (2002). This court recognized an access to court claim whose justification "is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed." *Id.*

B. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to Access to Courts Where Government Actions Resulted in Claimant's Failure to Comply With FTCA Time Limits.

The basis for equitable tolling in *United States v. June*, No. 13-1075, also focuses on conduct by the Federal Government. Because the district court dismissed plaintiff's FTCA cause of action as untimely, this Court "accept[s] as true the allegations of the complaint." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012).

The case arises out of a highway tragedy on February 19, 2005 on Interstate 10 in Arizona. A driver lost control, entered the median, passed through the cable median barrier, and crashed into oncoming traffic, killing both the driver and her passenger. Plaintiff June filed an action against the state of Arizona for the wrongful death of the passenger, alleging that the cable median barrier installed at that location was defective and failed to prevent the car from crossing the median as intended. Resp't's Br. 10, *United States v. June*, No. 13-1075 (U.S. Nov. 4, 2014).

In September 2005, the Federal Highway Administration ("FHWA") issued a public memorandum falsely stating that the cable median barrier used on Interstate 10 had been approved as crashworthy. *Id.* For two years, FHWA refused to make personnel available for deposition in plaintiff's state court action. In April 2009 plaintiff's counsel was finally able to depose those employees and "learned

for the first time that the FHWA had knowingly permitted the cable median barrier to be installed and remain in service despite never having passed the FHWA's crashworthiness testing." *Id.* at 10-11.

After denial by FHWA of her administrative tort claim, June filed suit under the FTCA in district court and argued that the two-year limitation should be equitably tolled due to the Government's concealment. The district court granted the Government's motion to dismiss. *Id.* at 12. The court of appeals reversed, holding that federal courts may invoke the doctrine of equitable tolling. This Court should uphold the equitable powers of the courts to avoid dismissal of FTCA claims that would amount to violation of the plaintiff's right to access to the courts.

This Court has made clear that access to the courts is a fundamental constitutional right which this Court has grounded in "the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses." *Christopher*, 536 U.S. at 415 n.12 (citations omitted).

In that case, Jennifer Harbury, whose husband disappeared in Guatemala, alleged that U.S. State Department officials had falsely denied knowing of her husband's whereabouts and had concealed the CIA's involvement in his detention, thereby depriving her of the ability to file a lawsuit that may have saved his life. *Id.* at 405. Ms. Harbury was ultimately unsuccessful in this Court because her complaint did not describe the underlying cause of action she might have brought nor identify the remedy that might have been awarded. *Id.* at 415.

However, Justice Souter, writing for a unanimous Court, took pains to make clear: Actions by government employees to conceal or misrepresent facts and thereby prevent an individual from filing a legitimate lawsuit in which relief might be awarded constitute a violation of the individual's right of access. The Court's opinion cites with approval a line of decisions by U.S. courts of appeals that demonstrate this principle. *See id.* at 414 & n.7.

In one example, local prosecutors who falsified a death certificate to indicate suicide, rather than murder as the cause of death, may be held to have deprived the victim's family of access to court to file a wrongful death action against the murderer. *Ryland v. Shapiro*, 708 F.2d 967, 972-73 (5th Cir. 1983).

Similarly, where police officers tampered with evidence and gave false statements in order to cover up a police shooting of an unarmed black youth, the Fifth Circuit upheld an award of damages to the victim's family under 42 U.S.C. § 1983 for violation of their right of access to court to pursue a wrongful death action. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

The court stated,

> To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress.

Id. at 1261.

A third decision that this Court looked to is *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). Swekel's husband was fatally injured when he was struck by two cars as he crossed the street. Swekel successfully pursued a wrongful death action against the one driver. However, she alleged, police officers covered up evidence of the identity of the second driver because that driver was the son of a high-ranking police officer. Swekel brought a § 1983 action against the officers for violation of her right to access to courts, alleging that their concealment delayed her discovery of the identity of the second driver until after the wrongful death statute of limitations had passed. *Id.* at 1260-61.

The Sixth Circuit acknowledged that "a state official's actions in covering-up evidence [may amount] to a denial of access to the courts." *Id.* at 1262 (discussing both *Bell* and *Ryland*). However, the court pointed out, "[i]n most instances, state courts can address pre-filing abuses *by tolling the statute of limitations*." *Id.* at 1264. Because Swekel had not given the state court the opportunity to toll the limitation in her case, the court found that she had not been denied her federal constitutional right of access. *Id.*

This Court should recognize that equitable tolling of limitations periods is a tool that should be available to federal courts to suspend the time limitation and allow plaintiff's cause of action to proceed in circumstances such as those present in *United States v. Wong* and *United States v. June* where harsh enforcement of the deadlines would result in depriving plaintiffs of their constitutional rights to due process or access to the courts.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the judgments below.

November 12, 2014

Respectfully submitted,

Jeffrey R. White
Counsel of Record
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
777 6th St. N.W.
Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com

Attorney for Amicus Curiae American Association for Justice

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 12 2014
OFFICE OF THE CLERK

No. 13-1074

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

KWAI FUN WONG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CLINIC FOR LEGAL ASSISTANCE TO SERVICEMEMBERS AND VETERANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Laurie Forbes Neff
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive-MS1 G3
Arlington, VA 22201
(703) 993-8179
lneff@gmu.edu

James C. Martin
Counsel of Record
Colin E. Wrabley
Patrick M. Emery
Douglas C. Allen
M. Patrick Yingling
REED SMITH LLP
225 Fifth Ave.
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com
Counsel for Amicus Curiae

November 12, 2014

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

A. Equitable Tolling Allows Courts To Mitigate Unfair Prejudice Resulting From An Inability To Meet A Statutory Limitations Period. 4

B. Courts Invoke Equitable Tolling With Respect To Section 2401(b)'s Six-Month Limitations Period To Promote Fairness And Avoid Injustice. 7

C. Equitable Tolling Should Be Applied Under The FTCA..... 12

CONCLUSION..... 14

TABLE OF AUTHORITIES

Page(s)

Cases

Burnett v. New York Cent. R.R. Co.,
380 U.S. 424 (1965) 5, 6

Clark v. United States,
226 F. App'x 337 (5th Cir. 2007) 11

Credit Suisse Sec. (USA) LLC v. Simmonds,
132 S. Ct. 1414 (2012) 4

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 5

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238 (1944) 6

Holland v. Florida,
560 U.S. 631 (2010) 6

Hoslett v. Dhaliwal,
No. 3:11-CV-00674-KI, 2013 WL 5947253 (D. Oregon Nov. 6, 2013) 10

Hyatt v. United States,
968 F. Supp. 96 (E.D.N.Y. 1997) 7, 8

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 12

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 6

Jackson v. United States,
751 F.3d 712 (6th Cir. 2014) 5, 11

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 4

Lehman v. United States,
154 F.3d 1010 (9th Cir. 1998) 11

McCaffrey v. Nylon, Inc.,
No. 95-3787, 1996 WL 122710
(E.D. Pa. Mar. 13, 1996)..... 9, 10

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47 (2006) 1

Shankar v. United States Dep't of Homeland Sec.,
Nos. 13-cv-01490 NC & 13-cv-01490,
2014 WL 523960 (N.D. Cal. Feb. 6, 2014)..... 10

Stanfill v. United States,
43 F. Supp. 2d 1304 (M.D. Ala. 1999)..... 8, 9

United States v. Kubrick,
444 U.S. 111 (1979) 4

Statutes

28 U.S.C. § 2401(b) .....passim

Other Authorities

Damon W. Taaffe, *Tolling the Deadline for Appealing in Absentia Deportation Orders Due to Ineffective Assistance of Counsel*, 68 U. Chi. L. Rev. 1065 (2001) 4

INTEREST OF *AMICUS CURIAE* [1]

The Clinic for Legal Assistance to Servicemembers and Veterans (CLASV) is dedicated to providing active-duty members of the armed forces, their families, and veterans with free legal representation in matters of clear injustice or where they cannot retain counsel without undue hardship. CLASV was established in 2004 at George Mason University School of Law, and has assisted hundreds of servicemembers, their families, and veterans in matters involving civil litigation, family law, landlord-tenant disputes, military law, contract issues, administrative law, and bankruptcy in federal and state forums. The services rendered by CLASV have a direct bearing on the readiness, quality of life, and morale of the armed forces and their families.

In 2006, CLASV students were *amici curiae* in the only brief from the law school community that supported, against constitutional attack, the Solomon Amendment. That Amendment provides an incentive for law schools to allow on campus recruiters from the military. It was upheld by a unanimous decision of this Court. *See Rumsfeld v.*

---

[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief.

Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).

CLASV has received written support and recognition from the President of the United States, United States Senators, a United States Congressman, the General Counsel of the Department of Defense, the Judge Advocate General of the Army, the Staff Judge Advocate at Marine Corps Base Quantico, and all five legal assistance policy chiefs of the armed forces. CLASV has been featured in essays appearing in the *National Law Journal*, *Business Law Today*, and the *Richmond Times-Dispatch*, and in articles in the *Washington Post*, the *Fairfax Times*, the *Legal Times*, *Stars and Stripes*, and the *Los Angeles Daily Journal*.

Pursuant to its organizational mission, CLASV assists servicemembers, their families, and veterans in the presentation and litigation of claims under the Federal Tort Claims Act (FTCA). Based on its experience in providing that assistance, and given the challenges faced by military families in submitting administrative claims under the FTCA, CLASV has filed an *amicus curiae* brief in support of Respondent in *United States v. Marlene June, Conservator*, No. 13-1075. The issue in *June* concerns whether equitable tolling may be invoked with respect to the FTCA's two-year statutory limitations period for submitting an administrative claim.

This case presents a parallel issue concerning the application of equitable tolling in lawsuits under the FTCA. CLASV accordingly submits this brief in support of Respondent to describe the limited but impactful role that the equitable tolling doctrine plays in ensuring fairness for FTCA litigants, including military servicemembers, their families, and veterans.

SUMMARY OF ARGUMENT

The equitable tolling issue in this case concerns the applicability of the doctrine to the six-month period for bringing an FTCA action following the denial of an administrative claim. *See* 28 U.S.C. § 2401(b). Just as in the administrative claim context, the equitable tolling doctrine has been applied and currently is relied on by litigants pursuing FTCA claims, including servicemembers, their families, and veterans, to promote fairness and avoid injustice in those limited circumstances where the doctrine applies.

In the context of the FTCA, just as in private litigation, the application of equitable tolling mitigates the harsh consequences of a limitations bar, without undermining the purposes served by the statute of limitations. Here, just as in *June*, the question of whether equitable tolling can be applied under the FTCA is debated among the parties. But here, too, there is no debate about the utility of the doctrine in helping litigants who have acted

diligently but face the limitations bar. As a matter of fairness and in the interests of justice, CLASV urges this Court to continue the present practice and apply the doctrine to lawsuits brought under the FTCA.

ARGUMENT

A. Equitable Tolling Allows Courts To Mitigate Unfair Prejudice Resulting From An Inability To Meet A Statutory Limitations Period.

The FTCA provides that "[a] tort claim against the United States shall be forever barred . . . unless action is begun within six months after the . . . final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). This provision's "obvious purpose[] . . . is to encourage the prompt presentation of claims." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Like many statutes of limitations, the FTCA's provision is intended to "'protect defendants against stale or unduly delayed claims.'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008)).

In various circumstances, however, the application of a limitations bar can work a profound injustice by foreclosing litigation of meritorious claims. *See* Damon W. Taaffe, *Tolling the Deadline*

for Appealing in Absentia Deportation Orders Due to Ineffective Assistance of Counsel, 68 U. Chi. L. Rev. 1065, 1067 (2001) ("Statutes of limitations are inherently harsh because they cut off a person's rights without regard to the merits of the claim.") (citation and internal quotation marks omitted). Yet, as this Court has recognized, those harsh consequences should be avoided "where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). Application of equitable tolling, in turn, represents one of those instances where the interests of justice intercede to relieve a litigant from the harsh consequences of a statute of limitations.

To that end, the equitable tolling doctrine "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation and internal quotation marks omitted); *Jackson v. United States*, 751 F.3d 712, 718 (6th Cir. 2014) ("Equitable tolling allows a federal court 'to toll a statute of limitations when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.'") (citation omitted).

In applying equitable tolling, courts "follow[] a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise

from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Holland v. Florida*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). The equitable tolling doctrine thus "enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id.* (citation and internal quotation marks omitted).

As is relevant here, this Court has acknowledged the doctrine's utility and applicability in suits brought against the Government, just as in private litigation. Most notably, in *Irwin v. Department of Veterans Affairs*, this Court invoked the doctrine "presumptively" in suits against the United States in the same way as is done in suits against private defendants. 498 U.S. 89, 95-96 (1990). There, the Court emphasized that equitable tolling can be used to achieve fundamental fairness in appropriate situations, such as "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass[,]" but not where a plaintiff "failed to exercise due diligence in preserving his legal rights." *Id.* at 458.

Equitable tolling thus plays an important role in mitigating the unfair prejudice that can result

from a plaintiff's inability to meet a statutory limitations period. The doctrine, where applicable, is critical to the pursuit of lawsuits brought under the FTCA that would otherwise be barred by the controlling six-month limitations provision.

B. Courts Invoke Equitable Tolling With Respect To Section 2401(b)'s Six-Month Limitations Period To Promote Fairness And Avoid Injustice.

Following this Court's reasoning and rationale in *Irwin*, courts have equitably tolled § 2401(b)'s six-month limitations period where the facts warrant it to ensure fundamental fairness without prejudicing defendants or incentivizing a lack of diligence.

In that regard, *Hyatt v. United States* is illustrative of the circumstances where the doctrine is justly applied. There, a plaintiff brought an FTCA action in the district court around the same time that he presented an FTCA administrative claim to a federal agency. 968 F. Supp. 96 (E.D.N.Y. 1997). The administrative claim was quickly denied, but rather than re-file his complaint based on the denial, the plaintiff was induced by the Government's attorney to merely move forward with discovery in the district court until the court granted summary judgment based on the plaintiff's failure to exhaust his administrative remedies. *Id.* at 99. The court, however, allowed the plaintiff to file an amended complaint. *Id.* at 99-100. When the Government

argued that plaintiff's claim was barred under § 2401(b)'s six-month limitations period, the court invoked equitable tolling, finding that "plaintiff did actively pursue his judicial remedies by conducting discovery with his adversary during the statutory period, and . . . plaintiff was induced not to refile the complaint after the administrative denial." *Id.* at 101. Importantly, the court recognized that § 2401(b)'s "obvious purpose" of encouraging prompt presentation of claims was not undermined by equitable tolling because the Government was on notice to defend against the action and discovery was conducted within the statutory period—meaning that both the defendant and the court "were successfully protected from having to deal with a case in which the search for truth might otherwise have been seriously impaired by the loss of evidence." *Id.*

Also illustrative is *Stanfill v. United States*, 43 F. Supp. 2d 1304 (M.D. Ala. 1999). In that case, a military retiree, based on an injury suffered at a military hospital, submitted an FTCA administrative claim with Office of the Staff Judge Advocate. *Id.* at 1305-06. When the claim was denied, the plaintiff filed a timely suit in the district court. *Id.* at 1306. The Government, however, convinced the plaintiff to voluntarily dismiss his suit so that he could first present his claims to the Department of Labor. *Id.* When the Department of Labor denied his claims, the plaintiff brought

another FTCA action in the district court, more than six months after his original administrative claim was denied. *Id.* The court rejected the Government's argument that the plaintiff's claims were barred under § 2401(b), invoked equitable tolling, and held that "[c]learly, the more prudent course of action would have been to petition the court for a stay rather than agree to a voluntary dismissal," but that such an "error in judgment" did "not amount to a garden variety claim of excusable neglect in light of [his] active, aggressive pursuit of his claims." *Id.* at 1310. The court added that "section 2401(b) exists 'to encourage the prompt presentation of claims' against the federal government" and "does not exist to reward the United States for deft legal maneuvering." *Id.* (citation omitted). Also, because "[t]he Government was put on notice to defend against this action," the underlying purpose of the limitations period was not infringed on a[illegible]unt of equitable tolling. *Id.* at 1311.

Yet another representative example is *McCaffrey v. Nylon, Inc.*, No. 95-3787, 1996 WL 122710 (E.D. Pa. Mar. 13, 1996). There, plaintiffs submitted an FTCA administrative claim to the Department of Interior after falling on federal property. *Id.* at *1. By certified mail, the Government denied the claim, but the plaintiffs never received the denial letter. *Id.* While the plaintiffs were waiting to hear about the claim, their attorney inquired about the claim's status and

received assurances that he would be duly informed on a decision. *Id.* When the plaintiffs finally commenced an action in the district court, more than six months after their administrative claim was denied, the court applied equitable tolling to § 2401(b)'s time period. *Id.* at *2. The court relied on the fact that there was "evidence of repeated contact with plaintiffs' attorney and a promise to notify that attorney of the agency's decision, coupled with evidence that plaintiffs received no actual notice of denial of their claims." *Id.* The court added that "[t]his is not a case in which a litigant 'failed to exercise due diligence in preserving his legal rights," but that "[o]n the contrary, the [plaintiffs] and their counsel made every effort to do so." *Id.*

In a similar fashion, courts have applied equitable tolling where fairness and justice compel it so that potentially meritorious claims can be pursued. *See, e.g.*, *Shankar v. United States Dep't of Homeland Sec.*, Nos. 13-cv-01490 NC & 13-cv-01490, 2014 WL 523960, at *13 (N.D. Cal. Feb. 6, 2014) (applying the doctrine where defendant was on notice of the action and plaintiff missed the statutory deadline due to "technical defects"); *Hoslett v. Dhaliwal*, No. 3:11-CV-00674-KI, 2013 WL 5947253, at *3 (D. Oregon Nov. 6, 2013) (applying the doctrine where "pro bono counsel created a roadblock to [the plaintiff's] ability to file the Amended Complaint" and plaintiff was only able to file the complaint due to court "intervention").

The fact patterns in these cases underscore that equitable tolling in FTCA litigation is reserved for those cases that plainly compel a lifting of the statutory bar. Concomitantly, federal courts do not hesitate to reject application of the doctrine where the record does not show extraordinary circumstances, a lack of prejudice to the Government, or sufficient diligence in bringing an action. *See, e.g.*, *Jackson v. United States*, 751 F.3d 712, 720 (6th Cir. 2014) (declining to apply equitable tolling in part because of "prejudice" to the Government and the "difficulty the [G]overnment would have in litigating a matter" that was filed well beyond the six-month limitations period); *Clark v. United States*, 226 F. App'x 337, 338 (5th Cir. 2007) ("[A]lthough his counsel's untimely filing mistake was unfortunate, such mistakes do not equitably toll the FTCA's limitations period."); *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998) ("The mere expression of 'some confidence' that the agency 'would be interested in trying to settle' the case later is not enough to excuse plaintiffs' letting the statute of limitations lapse.").

In short, equitable tolling applies in FTCA cases in the same balanced manner as in private litigation. Where there has been a lack of diligence or unexcused delay, the limitations bar is applied, just as it would be in private litigation. Where, however, the record provides sound reasons to toll the statute, equitable tolling is applied as a matter

of fairness and justice, just as it would be in a private lawsuit.

C. Equitable Tolling Should Be Applied Under The FTCA.

The FTCA was enacted to provide a fair and just process for preserving the rights of individuals who have meritorious claims against the Government. *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of government activities[.]"). The doctrine of equitable tolling furthers the purpose of having meritorious claims heard on their merits where the interests of justice warrant it. As the cases discussed previously underscore, the doctrine plays a vital role in a narrow range of fact patterns to help protect those who have valid claims and allow recovery where the FTCA provides for it.

While the Government argues that the FTCA's six-month limitations period needs to be applied absolutely, and without recognition of equitable tolling, CLASV strongly opposes the Government's position. There is no express indication in the FTCA's limitations provision that equitable tolling cannot be applied. The Government adopts that position only by implication and inference from language that does not refer to tolling at all.

Nor is there any perceptible or quantifiable reason that equitable tolling should not be applied. The doctrine aligns with the FTCA's protective goals. And, there is no indication that the application of the doctrine in those cases where it is warranted has led to any wholesale assault on the public fisc. On the contrary, the federal courts have applied the doctrine carefully, and only where the record unequivocally supports it.

By the same token, however, the equitable tolling doctrine, when applicable, is of material benefit to FTCA litigants, including servicemembers and their families, who, despite their best efforts, cannot bring a timely action. The case-by-case application of the doctrine thus should be retained to help servicemembers and their families receive the benefits of the FTCA, rather than being burdened with the hardships that denial of a meritorious cause of action portends.

CONCLUSION

For the reasons noted, *amicus* respectfully urges this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

James C. Martin
Counsel of Record
Colin E. Wrabley
Patrick M. Emery
Douglas C. Allen
M. Patrick Yingling
REED SMITH LLP
225 Fifth Ave.
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com

Laurie Forbes Neff
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive-MS1 G3
Arlington, VA 22201
(703) 993-8179
lneff@gmu.edu

November 12, 2014 *Counsel for* Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-1074

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KWAI FUN WONG

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PARALYZED VETERANS OF AMERICA, MILITARY ORDER OF THE PURPLE HEART, JEWISH WAR VETERANS OF THE UNITED STATES, INC., NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL DEFENSE COMMITTEE, NATIONAL COALITION FOR HOMELESS VETERANS IN SUPPORT OF RESPONDENT

Rani Habash
DECHERT LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 261-3430

Joshua D. N. Hess
Counsel of Record
Mark DiPerna
Carl Gismervig
Jonathan Massey
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94104
(415) 262-4500
joshua.hess@dechert.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. Congress Has a Long and Ever-Expanding Record of Supporting Fair and Equitable Treatment for Veterans by the Federal Government 8

II. Due To Circumstances Unique To The Relationship Between Veterans And The VA System, Elimination Of Equitable Tolling For FTCA Claims Would Contravene Congress's Policy Goals. 13

III. Equitable Tolling Is Particularly Justified With Respect To FTCA Claims Brought By Veterans And Its Elimination Would Have A Devastating Impact. 20

A. Recent VA Scandals Demonstrate Systematic Efforts To Conceal Tortious Conduct Towards Veterans That May Go Unchecked Absent Tolling. 20

B. The Disproportionate Impact Of Cognitive Impairments On Veterans Render The Veteran Community Particularly Vulnerable To Abuse Of Process. 23

IV. This Court's Application Of The Common-Law "Discovery Rule" To The FTCA's Statute Of Limitations Requires Upholding "Equitable Tolling" As Well. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

A.Q.C. ex rel. Castillo v. United States,
656 F.3d 135 (2d Cir. 2011) 26

Arteaga v. United States,
711 F.3d 828 (7th Cir. 2013) 26

Bartus v. United States,
930 F. Supp. 679 (D. Mass. 1996) 17, 18, 19

Boone v. Lightner,
319 U.S. 561 (1943) 13

Davis v. United States,
375 F.3d 590 (7th Cir. 2004) 16

Deasy v. United States,
99 F.3d 354 (10th Cir. 1996) 16

Fishgold v. Sullivan Drydock &Repair Corp.,
328 U.S. 275 (1946) 13

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 25

Glarner v. United States,
30 F.3d 697 (6th Cir. 1994) 17

Hodge v. West,
155 F.3d 1356 (Fed. Cir. 1998) 14

June v. United States,
No. 11-901-PHX-SRB, Order Granting Mot. to Dismiss (D. Ariz. Nov. 1, 2011) 29

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991) 13

Kwai Fun Wong v. Beebe,
732 F.3d 1030 (9th Cir. 2013) 26

Miller v. Phila. Geriatric Ctr.,
463 F.3d 266 (3d Cir. 2006) 25

Nemmers v. United States,
795 F.2d 628 (7th Cir. 1986) 25, 26

SEC v. Gabelli,
653 F.3d 49 (2d Cir. 2011) 28

United States v. June,
No. 13-1075 4

United States v. Kubrick,
444 U.S. 111 (1979) ..... passim

United States v. Oregon,
366 U.S. 643 (1961) 8

STATUTES

38 U.S.C. § 503 9

38 U.S.C. § 1151 ..... passim

38 U.S.C. § 1151(a)(1) 15

38 U.S.C. § 1311 16

38 U.S.C. § 5103A 10, 17

OTHER AUTHORITIES

146 Cong. Rec. H6786 (daily ed. July 25, 2000) 10

146 Cong. Rec. S9211 (daily ed. Sept. 25, 2000) 11

146 Cong. Rec. S9212-13 (daily ed. Sept. 25, 2000) ... 4

38 C.F.R. § 14.604(a) 18

38 C.F.R. § 3.150(a) 18

38 C.F.R. § 3.361(b) 16

DoD Worldwide Numbers for TBI, Defense and Veterans Brain Injury Center 23

Federal Benefits for Veterans, Dependents and Survivors (2014 Edition) U.S. Dep't of Veterans Affairs 14, 15, 16

Findings Of The President's Commission On Care For America's Returning Wounded Warriors, H. Comm. on Veteran's Affairs, 110th Cong. (Sept. 19, 2007) 11

Friendly Fire: Death, Delay & Dismay at the VA, Senate Oversight Report of the U.S. Dep't of Veterans Affairs, June 24, 2014 20

History – Department of Veterans Affairs (VA), U.S. Dep't of Veterans Affairs 8

Homeless Veterans Background & Statistics, Nat'l Coalition for Homeless Veterans 24

J. Sweigart and A. Diamant, *VA's Malpractice Tab: $845M in 10 Years,* Cox Media Group, Nov. 12, 2013 15

June v. United States, No. 11-901-PHX-SRB, Order Granting Mot. to Dismiss (D. Ariz. Nov. 1, 2011) 29

Phoenix VA Officials Put on Leave After Denial of Secret Wait List, CNN, May 1, 2014 21

President's Commision on Veterans' Pensions, *Veterans' Benefits in the United States, Findings and Recommendations* (Apr. 1956) 9

Remarks by Secretary Eric K. Shinseki U.S. Dep't of Veterans Affairs, *2014 National Coalition for Homeless Veterans Annual Meeting* (Washington D.C. May 30, 2014) 6, 19

Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practice as the Phoenix VA Health Care System 21

Scheduling Manipulation and Veteran Deaths in Phoenix: Examination of the OIG's Final Report, H. Comm. on Veteran's Affairs, 113th Cong. (Sept. 17, 2014) 12

Sup. Ct. R. 37.6 1

Texas VA Run Like a 'Crime Syndicate,' Whistleblower Says, The Daily Beast, May 27, 2014 21

VA Access Audit & Wait Times Fact Sheet, U.S. Dep't of Veterans Affairs (June 9, 2014) 14

VA Benefits & Health Care Utilization, U.S. Dep't of Veterans Affairs 26

VA Hospital Knew Human Error Caused Legionnaires' Outbreak, CBS News, March 13, 2014 22

Veterans Health Administration (2014 Edition), U.S. Dep't of Veterans Affairs 14

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are all service and advocacy organizations whose missions are to assist and further the interests of the over 25 million living veterans and active service members of the United States armed forces. They all share a strong interest in ensuring that these veterans and service members receive the benefits to which they are entitled by virtue of their service and sacrifice to the Nation. Moreover, they share an interest in ensuring that the Government is held accountable when it fails to provide these benefits or causes injury to veterans, whether in the provision of these benefits or through other misconduct.

Paralyzed Veterans of America ("PVA"), a congressionally chartered veterans service organization founded in 1946, has developed a unique expertise on a wide variety of issues involving the special needs of veterans of the armed forces who have experienced spinal cord injury or dysfunction. PVA uses that expertise to be the leading advocate for quality health care for veterans, research and education addressing spinal cord injury and dysfunction, benefits available as a result of its members' military service, and civil rights and opportunities that maximize the independence of its members.

---

[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief.

The Military Order of the Purple Heart ("MOPH"), chartered by Congress in 1958, is a non-profit organization comprised of military men and women who received the Purple Heart for wounds received in combat. It is the only veterans' service organization comprised exclusively of combat veterans. Through its National Service Program, MOPH operates a nationwide network of 77 service offices that have assisted over 91,000 veterans and their families obtain well-deserved benefits. MOPH provides service to veterans through volunteers at over 100 Veterans Health Administration Medical Centers and clinics across the country. MOPH also promotes Americanism through its myriad educational and scholarship programs.

The Jewish War Veterans of the United States, Inc. ("JWV"), organized in 1896 by Jewish Veterans of the Civil War, is the oldest active national veterans' service association in America. JWV is a federally chartered patriotic organization that has among its purposes a continuing commitment to maintain true allegiance to the United States of America; to foster and perpetuate trust in Americanism; to uphold the fair name of Jews and fight their battles wherever unjustly assailed; to encourage the doctrine of universal liberty, equal rights, and full justice to all men and women; to combat the powers of bigotry and darkness wherever originating and whatever the target; and to preserve the memories and records of patriotic service performed by the men and women of the Jewish faith and honor their memory. In furtherance of its organizational purposes, JWV engages in extensive advocacy in support of veterans.

The National Veterans Legal Services Program ("NVLSP") is a federally chartered, nonprofit organization that has worked since 1980 to ensure that the Government delivers to our Nation's 25 million veterans and active duty personnel the benefits to which they are entitled because of disabilities resulting from their military service to our country. NVLSP provides pro bono legal assistance (through its own lawyers as well as a network of outside volunteer counsel) to veterans with disability issues in connection with claims for benefits to which they are entitled.

The National Defense Committee is a War Veterans organization that focuses on matters that impact upon the individual civil rights of military personnel and veterans and benefits programs for individual military personnel and veterans, as they relate to veterans' care, national defense, homeland security, and national security.

The National Coalition for Homeless Veterans ("NCHV") is a nonprofit organization that serves as the resource and technical assistance center for a national network of community-based service providers and local, state and federal agencies that provide emergency and supportive housing, food, health services, job training and placement assistance, legal aid and case management support for hundreds of thousands of homeless veterans each year. NCHV also serves as the primary liaison between the Nation's care providers, Congress, and the Executive Branch agencies charged with helping them succeed in their work. NCHV's advocacy has strengthened and increased funding for virtually every federal

homeless veteran assistance program in existence today.

Amici assert that the position presented by the Government in this case – as well as in *United States v. June*, No. 13-1075 – would have a profoundly prejudicial impact on America's veterans and is contrary to the longstanding national policy that veterans are to be provided every benefit of the doubt and assistance in their interactions with the Government.

SUMMARY OF ARGUMENT

I. Congress has a long and ever-expanding record of supporting policies that promote the fair and equitable – even preferential – treatment of this Nation's veterans with respect to their interactions with the federal government. This solicitude is especially pronounced in connection with veterans' efforts to assert claims for benefits and compensation from the Department of Veterans Affairs ("VA"). Indeed, Congress has long imposed on the VA a "duty to assist" veterans in obtaining such benefits and compensation. Moreover, in creating the process by which veterans obtain benefits and compensation from the federal government, Congress has been adamant that the Government "should not create technicalities and bureaucratic hoops for them to jump through." 146 Cong. Rec. S9212-13 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller).

II. One of the ways in which Congress's solicitude toward veterans has manifest itself is through a complex system of benefits that, while valuable, also renders veterans far more susceptible to governmental negligence than average citizens. Most notably,

millions of veterans receive their health care through the Veterans Health Administration ("VHA"). Each year, veterans submit thousands of claims for medical malpractice against the VHA.

The complexity of the VA system, combined with the VA's statutory notice and assistance obligations, has created a confusing process that often results in veterans unwittingly failing to submit Federal Tort Claims Act ("FTCA") claims properly. Victims of medical malpractice by the VHA have two avenues of recourse: the FTCA and an administrative claim under 38 U.S.C. § 1151. Section 1151 compensation is awarded exclusively through a VA administrative process and provides limited compensation on a monthly basis that "dies with the veteran." The FTCA, on the other hand, provides a lump-sum payment that takes into account, for example, pain and suffering and lost wages, and is also transferrable to a veteran's spouse or family members upon the veteran's death. Because of this dual-track process, the VA – who possesses a "duty to assist" veterans with benefits claims and upon whom veterans rely for such assistance – frequently instructs claimants about the Section 1151 claims process, but not the separate FTCA claims process. Consequently, veterans who believe they are diligently pursuing the administrative process to assert all of their malpractice claims against the VA are often surprised to find they are pursuing only the limited Section 1151 claim and not the more valuable FTCA claim. Courts have applied equitable tolling in such cases to alleviate the resulting injustice, but a ruling in favor of the Government here would remove this vital check on this administrative legerdemain.

III. Equitable tolling is particularly merited with respect to claims brought by veterans for other reasons as well. Recent scandals at the VA have uncovered a "systemic, totally unacceptable lack of integrity within" the VHA. Remarks by Secretary Eric K. Shinseki, U.S. Dep't of Veterans Affairs, *2014 National Coalition for Homeless Veterans Annual Meeting* (Washington D.C. May 30, 2014), *available at http://www.va.gov/opa/speeches/2014/05_30_2014.asp* (last visited Nov. 7, 2014). Specifically, investigations have revealed widespread efforts to conceal and misrepresent failures in care provided to veterans at VHA health facilities, including falsifying records regarding patient waiting times and covering-up patients' exposure to Legionnaires' disease. Such actions to conceal evidence undercuts the ability of a veteran to exercise legal recourse against the Government and to attain a remedy allowed under the law.

In addition to these recent scandals, certain characteristics of the veterans community makes it particularly in need of equitable treatment. Millions of veterans suffer from some sort of mental health disorder or cognitive impairment as a result of their service. Such conditions often render veterans unable to follow procedural formalities scrupulously. Additionally, veterans comprise a disproportionate percentage of America's homeless population relative to their representation in the general populace. The lack of a mailing address alone means that these veterans have no reliable means of receiving notice under the FTCA regarding their claims. Moreover, the lives of the homeless are defined by extraordinary circumstances on a daily basis. The withdrawal of equitable treatment under these circumstances

would be particularly antithetical to Congress's policy toward veterans.

IV. Finally, a holding that upholds the application of equitable tolling to FTCA claims is consistent with this Court's application of the "discovery rule" in determining the accrual of medical malpractice claims under the FTCA. In *United States v. Kubrick*, 444 U.S. 111, 113 (1979), in connection with a medical malpractice claim brought by a veteran under the FTCA, the Court rejected the general rule of accrual and instead adopted the more equitable "discovery rule," which provides that the statute of limitations begins to run only when the plaintiff knows of *both* the existence of his injury and its cause. The "discovery rule" is a common-law doctrine of equity that this Court found was consistent with the Government's waiver of sovereign immunity under the FTCA. The application of equitable tolling would not extend the United States' waiver of sovereign immunity any more than the application of the common-law "discovery rule."

Furthermore, a holding that prohibits the application of equitable tolling would force lower courts to make arbitrary distinctions between, for example, whether the FTCA's statute of limitations did not expire because the plaintiff was unaware of "the cause" of her injury, or did expire because the existence of the claim was fraudulently concealed after the fact. The survival of veterans' medical malpractice claims should not hang on such an illusory distinction.

ARGUMENT

I. Congress Has a Long and Ever-Expanding Record of Supporting Fair and Equitable Treatment for Veterans by the Federal Government.

"The solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). This statement by the Court, in the context of the ever-increasing scale of pensions, homes, hospitals and other facilities provided for veterans, represents the lens through which the Court should interpret Congress's general intent that veterans receive fair and equitable treatment, and even preferential treatment where reasonable, from the federal government.

One of the earliest known examples of the codification of our cultural belief that veterans should be afforded generous treatment in exchange for their service dates to 1636, when the Plymouth Colony passed a law to support disabled soldiers from conflicts with the Pequot Indians. *See History – Department of Veterans Affairs (VA)*, U.S. Dep't of Veterans Affairs, *available at http://www.va.gov/about_va/vahistory.asp* (last visited Nov. 7, 2014). Examples of the same principle continued through the Revolutionary War and beyond, including supporting soldiers from both sides of the Civil War, and every other major conflict involving United States service men and women since. *Id.*

As the number of veterans increased in the 20th Century, Congress adapted to increase not only the amount and scope of benefits for veterans, but also included improving and expanding the process for

veterans to receive benefits under notions of equity. For example, in 1956, the United States created the Commission on Veterans' Pensions (commonly known as the Bradley Commission) with the goal of analyzing the way veterans receive benefits and to provide guidance and a framework for providing federal benefits to veterans going forward. The Bradley Commission established certain principles, including:

- "The Government should do everything within its power to distribute the burdens of war service as equitably as possible" and that "[t]imely and adequate assistance must be provided to alleviate the war-incurred handicaps of servicemen"; and
- "Fair and equal treatment of all veterans, disabled and nondisabled, according to their service-connected needs, should be the guiding principle in all our programs."

President's Commission on Veterans' Pensions, *Veterans' Benefits in the United States, Findings and Recommendations*, at 10-12 (Apr. 1956).

The guiding principles set forth by the Bradley Commission can be readily traced forward to subsequent statutory regimes enacted in the second half of the 20th Century. For example, in 1972, Congress added a new clause to the Veteran's Compensation and Relief Act to allow the Secretary of Veterans Affairs to provide for equitable relief in situations where the letter of the law otherwise would not. *See* 38 U.S.C. § 503. In this Act, Congress codified the concept that a veteran should not be barred from applicable benefits due to administrative error, delay,

or any other cause beyond the actual nature of the claim.

In another context, Congress reaffirmed and clarified that support and assistance should be provided to veterans to ensure their claims are properly heard. In the Veterans Claims Assistance Act of 2000, Congress re-codified the long-recognized "duty to assist claimants" in making claims to the VA. *See* 38 U.S.C. § 5103A. This duty, in addition to underscoring the non-adversarial relationship between veterans and the VA, requires the VA to assist veterans in obtaining evidence required to properly adjudicate veteran claims submitted to the VA.

In its debates prior to passing the Act, Congress voiced particular displeasure with certain narrow judicial constructions that it felt necessitated passage of the legislation. During the House's deliberations on the bill, Representative Evans stated, "[v]eterans ... have earned, as a result of their service to our country, [the right] to have their claims [to the VA] decided fairly and fully." 146 Cong. Rec. H6786 (daily ed. July 25, 2000) (statement of Rep. Evans). In the Senate, Senator Rockefeller echoed this sentiment:

> The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate. . . . It is critical that we honor our commitment to veterans and their families. ***We should not create technicalities and bureaucratic hoops for them to jump through***.

146 Cong. Rec. S9211 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller) (emphasis added).

In addition to direct legal obligations to veterans, equitable treatment of our service members and veterans is necessary to secure our significant and immediate military and national security needs. In order to maintain the vitality of our all-volunteer military force, it is necessary for the Government to keep faith with servicemen and veterans concerning their treatment and care. Administrative failings measureable in the loss of lives and health of our servicemen or veterans such as the events at Walter Reed, uncovered in 2007, and the conduct of the Phoenix Veteran Health Administration system, uncovered just this year, undermine this national policy.

In the aftermath of the Walter Reed Scandal, the then-ranking member of the House Committee on Veterans Affairs noted, "[w]e are involved in a long war against terrorism. For this, the Nation's mothers, fathers and spouses trust their sons and daughters and spouses to the Nation's armed forces. They must be confident that they will be cared for should harm come their way." *Findings Of The President's Commission On Care For America's Returning Wounded Warriors*, H. Comm. on Veteran's Affairs, 110th Cong. (Sept. 19, 2007) (statement of Rep. Steve Buyer, Ranking Member, H. Comm. on Veteran's Affairs), *available at https://veterans.house.gov/hearing-transcript/findings-of-the-presidents-commission-on-care-for-americas-returning-wounded* (last visited Nov. 7, 2014). These remarks make clear that the federal government's duties to care for veterans, whether express or implied, are different from and greater than duties arising from other governmental activities. Harms to veterans that are not redressed negatively impact individual veterans and,

in the aggregate, can potentially undermine the viability of military recruitment and retention, which are vital components to the preservation of our national security.

Given the necessary relationship between effective care of veterans and the ongoing efficacy of our active military, it is clear why Congress loudly objects when events threaten the integrity of the Nation's express and implied promises to effectively care for veterans. For example, following the recent scandal related to the Phoenix Veteran Health Administration system, the ranking member of the House Committee on Veteran's Affairs stated, "[m]y heart goes out to the families of the veterans who did not receive the health care they deserved in Phoenix and around the country. Rest assured, we will understand what went wrong, fix it, and hold those responsible for these failures accountable." *Scheduling Manipulation and Veteran Deaths in Phoenix: Examination of the OIG's Final Report*, H. Comm. on Veteran's Affairs, 113th Cong. (Sept. 17, 2014) (statement of Rep. Michael Michaud, Ranking Member, H. Comm. on Veteran's Affairs), *available at http://veterans.house.gov/opening-statement / honorable-michael-michaud* (last visited Nov. 7, 2014).

Consistent with these statements, this Court has recognized, in a variety of contexts, Congress's intent that laws that benefit veterans should be equitably interpreted in favor of them. For example, in 1943, the Court construed a veterans' benefits statute "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The Court's decision in *Fishgold v. Sullivan Drydock &*

Repair Corp., decided the same year the FTCA was enacted, also echoed this sentiment by construing a statute in favor of veterans to benefit "those who left private life to serve their country in its hour of great need." 328 U.S. 275, 285 (1946). A further example of the same principle is provided in *King v. St. Vincent's Hosp.*, where the Court embraced "the canon [of statutory construction] that provisions for benefits to members of the [a]rmed [s]ervices are to be construed in the beneficiaries' favor." 502 U.S. 215, n.9 (1991). In each of these rulings, the Court embraced the idea that laws that provide relief for veterans should be interpreted in a manner so as to best provide veterans with the care they need.

These examples throughout the Nation's history provide both a reflection of Congress's intent of solicitude toward veterans and a policy framework within which any legal matter impacting the rights or benefits of veterans in connection with their pursuit of claims against the Government should be equitably interpreted in favor of veterans' interests.

II. Due To Circumstances Unique To The Relationship Between Veterans And The VA System, Elimination Of Equitable Tolling For FTCA Claims Would Contravene Congress's Policy Goals.

Consistent with this longstanding policy favoring America's veterans, Congress has created a system of support and assistance to veterans in recognition of their service to the Nation.[2] These programs were

---

[2] *See, e.g.*, *Federal Benefits for Veterans, Dependents and Survivors* (2014 Edition), U.S. Dep't of Veterans Affairs, *available at*

intended to guide veterans through a "non-adversarial system of awarding benefits to veterans," often giving veterans the benefit of any reasonable doubt. *See Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (noting Congress both recognized and wished to preserve the non-adversarial nature of awarding benefits to veterans).

The VA identifies "provid[ing] ... high quality medical care and benefits" as its most important mission. *VA Access Audit & Wait Times Fact Sheet*, U.S. Dep't of Veterans Affairs (June 9, 2014), *available at http://www.va.gov/health/docs/ vaaccessauditsystemwidefactsheet060914.pdf* (last visited Nov. 7, 2014). This mission is implemented through the Veterans Health Administration ("VHA"), which is the largest integrated health care system in the United States, with over 1,700 healthcare sites serving 8.76 million veterans each year. *See Veterans Health Administration* (2014 Edition), U.S. Dep't of Veterans Affairs, *available at http://www.va.gov/health* (last visited Nov. 7, 2014). Although the VHA system provides many valuable benefits, it is also is liable for many injuries to veterans and their families. Between January 2003 and the middle of 2013, the VA paid approximately $845 million in judgments and settlements to resolve 4,426 of more than 16,000 medical malpractice claims brought by veterans and their families. J. Sweigart and A. Diamant, *VA's Malpractice Tab: $845M in 10*

---

http://www.va.gov/opa/publications/benefits_book/2014_Federal_Benefits_for_Veterans_English.pdf ("*Federal Benefits for Veterans, Dependents and Survivors*") (last visited Nov. 7, 2014).

Years, Cox Media Group, Nov. 12, 2013, *available at http://www.daytondailynews.com/news/news/vas-malpractice-tab-845m-in-10-years/nbpj4* (last visited Nov. 7, 2014). As these figures attest, medical malpractice claims against the VA represent a significant category of tort claims brought by veterans.

In cases of medical malpractice by the VA, veterans or their survivors may choose to pursue both a negligence claim under the FTCA as well as a disability compensation claim under 38 U.S.C. § 1151 ("Section 1151"), but the two claims are very different both in terms of the compensation they afford and the procedural requirements they impose.

Section 1151 provides veterans subject to VA negligence with monthly compensation benefits that often does not provide complete relief. *See Federal Benefits for Veterans, Dependents and Survivors*, at 35 (listing monthly payment amounts, based on percent of disability). Under Section 1151, the VA makes monthly payments to an injured veteran based on the veteran's rate schedule disability-classification, and other predefined factors. *See* 38 U.S.C. § 1151(a)(1) (establishing the conditions under which a veteran can recover for VA-caused disabilities).[3] Because Section 1151 payments "die with the veteran," the veteran's survivors receive no con-

---

[3] *See also Federal Benefits for Veterans, Dependents and Survivors*, at 35 (listing monthly payment amounts, based on percent of disability).

tinuing benefit.[4] Furthermore, Section 1151 claims only compensate for the additional disability caused by the medical negligence. *See* 38 U.S.C. § 1311; 38 C.F.R. § 3.361(b). Accordingly, when a veteran is already significantly disabled, the added disability may result in limited additional compensation.

In contrast, the VA pays a lump sum under the FTCA, taking into consideration the veteran's individual pain, suffering, and economic loss.[5] Unlike the monthly benefits afforded under Section 1151, FTCA awards pass to survivors by will or intestacy. Because FTCA awards are individualized and devisable, veterans who recover under the FTCA, rather than or in conjunction with Section 1151, are better able to care for themselves and their families.

Because both Section 1151 and the FTCA compensate for VHA medical malpractice and involve VA administrative processes, veterans and the VA often

---

[4] Under a claim for Dependency and Indemnity Compensation, however, a surviving spouse can seek relief if the VA medical malpractice causes the veteran's death. 38 U.S.C. § 1151(a)(1). Even then, a surviving spouse is eligible to receive only a small monthly sum (approximately $1,233.23 per month for most surviving spouses in 2014). 38 U.S.C. § 1311; *Federal Benefits for Veterans, Dependents and Survivors*, at 116.

[5] *See, e.g., Davis v. United States*, 375 F.3d 590, 591 (7th Cir. 2004) (affirming an award for economic loss and pain and suffering for a veteran's claim against the North Chicago VA hospital that performed the wrong medical procedure and had failed to inform the veteran that medication, instead of invasive surgery, could also treat his condition); *Deasy v. United States*, 99 F.3d 354, 360 (10th Cir. 1996) (upholding an award for pain and suffering relating to the VA's negligent psychiatric treatment).

confuse the two claims. *See, e.g., Bartus v. United States*, 930 F. Supp. 679, 682-83 (D. Mass. 1996) (noting that neither the VA nor the veteran understood the difference between Section 1151 and FTCA claims). Although veterans have the burden of providing the essential information necessary to make their claims, the VA has an affirmative duty to assist veterans in substantiating their claims. *See* 38 U.S.C. § 5103A. Although Section 1151 disability claims and FTCA negligence claims appear similar, veterans must initiate them in different ways. *See Glarner v. United States*, 30 F.3d 697, 700 (6th Cir. 1994) (noting that filing a FTCA claim involves filling out a SF-95 form, separate from the § 1151 claim for disability benefits). When veterans do not understand the different filing requirements (frequently due to the VA's erroneous guidance or negligence), they sometimes fail to file FTCA claims within the limitations period. *See, e.g., Bartus*, 930 F. Supp. at 682-83.

Given the VA's statutory notice and assistance obligations, veterans should not be penalized for mistakes or misdirection by the VA when veterans submit a claim only for the limited Section 1151 remedies, but not a claim under the FTCA, even though they believe they are pursuing both. Justice requires equitable tolling when veterans reasonably rely on the VA's guidance and, as a result, fail to file an administrative FTCA claim within the limitations period. When veterans approach the VA to file a negligence claim, the VA has a duty to provide the appro-

priate form for filing.[6] But because even the VA finds the distinction between § 1151 disability claims and FTCA negligence claims confusing, the VA does not always discharge its duty. When VA institutional incompetence (or worse) causes veterans to file more limited Section 1151 disability claims, but not FTCA negligence claims, courts rely on equitable tolling to remedy the resulting unfairness.

For example, in *Bartus*, the veteran-plaintiff experienced permanent asthma problems after a VA surgery. 930 F. Supp. at 680. The veteran approached a VA benefits counselor to discuss filing a negligence claim and the benefits counselor offered to file the claim on his behalf, consistent with the VA's duty to assist veterans. *Id.* The veteran, however, did not realize that the benefits counselor incorrectly filed the Section 1151 form instead of the FTCA form until almost two years later when the VA denied the veteran's "disability benefits" claim. *Id.* By then, the statute of limitations had run on his FTCA claim. *Id.* The court noted that, "[a]pparently, neither [the veteran] nor the benefits counselor understood the difference between a negligence claim for damages and a negligence claim for disability benefits; the

---

[6] *See* 38 C.F.R. § 14.604(a) ("Each person who inquires as to the procedure for filing a claim against the United States, predicated on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting within the scope of his or her employment, will be furnished a copy of SF 95, Claim for Damage, Injury, or Death."); 38 C.F.R. § 3.150(a) ("Upon request made in person or in writing by any person applying for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form will be furnished.").

counselor asked [the veteran] to complete a § 1151 form, the wrong form." *Id.* at 682. Because "[i]t would be distinctly unfair to allow this bureaucratic snafu to foreclose plaintiff's [FTCA] claim[,]" the court equitably tolled the statute of limitations for the veteran's FTCA claim. *Id* at 682-83. [7]

Without equitable tolling, the VA has limited incentives to educate its employees on the availability of FTCA claims and the differences between an FTCA claim and a Section 1151 claim. The VA has a duty to serve and care for veterans. When the VA provides negligent medical care, it should not be incentivized to compound the harm by further providing wrong or misleading advice, thus escaping liability for pain and harm it inflicted upon the veteran in the first place. The more extensive remedies available under the FTCA are therefore required to protect veterans and their families from the "systemic, totally unacceptable lack of integrity within" the VHA. *Remarks by Secretary Eric K. Shinseki*, U.S. Dep't of Veterans Affairs, (May 30, 2014), at *http://www.va.gov/opa/speeches/2014/05_30_2014.asp* (last visited Nov. 7, 2014).

---

[7] *See also Glarner*, 30 F.3d at 699 (equitably tolling FTCA statute of limitations where veteran-plaintiff told office of Disabled American Veterans in a VA Medical Center that he wanted to file a negligence claim and the officer breached his duty by filing a § 1151 form, rather than an FTCA Standard Form 95).

III. Equitable Tolling Is Particularly Justified With Respect To FTCA Claims Brought By Veterans And Its Elimination Would Have A Devastating Impact.

The equitable tolling doctrine is crucial to veterans and their families due to improprieties surrounding the health care system administered by the VA and the prevalence of mental health issues in the veteran population. These threats are not merely hypothetical. Recent investigations have revealed that the VA has allegedly concealed and falsified records to prevent the disclosure of failures in care. Veterans have a legal right to seek recourse for injuries they sustain while under the VA's care and active concealment of evidence wrongfully prevents that right from being exercised. Additionally, veterans disproportionately suffer from cognitive impairments that may cause difficulty in understanding and meeting statutory filing deadlines. Without equitable tolling, these factors would result in substantial injustices against veterans.

A. Recent VA Scandals Demonstrate Systematic Efforts To Conceal Tortious Conduct Towards Veterans That May Go Unchecked Absent Tolling.

The VA system is currently under intense scrutiny due to recent discoveries that VA personnel have "systemically covered up delays and deaths they have caused" to protect the bonuses of VA managers. *See, e.g.*, *Friendly Fire: Death, Delay & Dismay at the VA*, Senate Oversight Report of the U.S. Dep't of Veterans Affairs, Sen. Tom Coburn, at 4, June 24, 2014, *available at http://www.coburn.senate.gov*

/public/index.cfm?a=Files.Serve&File_id=577d9e90-ee2a-4eee-a52d-2cf394420761 ("Senate Oversight Report") (last visited Nov. 7, 2014). The extent of the alleged malfeasance is appalling and wide-ranging. Over the past decade, it is estimated that "more than 1,000 veterans may have died as a result of VA malfeasance." *Id.*

In Phoenix, for example, a whistleblower recently revealed that over the past few years, more than 1,400 veterans in need of health care were placed on a "secret list" and that documents were shredded to conceal long wait times from the public – and veterans in particular. *Phoenix VA Officials Put on Leave After Denial of Secret Wait List*, CNN, May 1, 2014, *available at http://www.cnn.com/2014/05/01/health/veterans-dying-health-care-delays/index.html* (last visited Nov. 7, 2014). The August 26, 2014 VA Office of Inspector General report, *Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practice as the Phoenix VA Health Care System* (the "Inspector General Report"), found that over 3,500 veterans, many of whom were included on "unofficial wait lists," were waiting to be scheduled for appointments, but were not included on the Phoenix VA official wait list. *See* Inspector General Report at 34. The Inspector General Report also documented "scheduling schemes" used by the Phoenix VA to meet wait time goals imposed by leadership. *Id.* at 49-53. Whistleblowers at VA hospitals in Texas, Wyoming, and New Mexico, among other VA facilities, have admitted to similar concealment practices taking place over the past several years. *See, e.g., Texas VA Run Like a 'Crime Syndicate,' Whistleblower Says*, The Daily Beast, May 27, 2014, *available at*

http://www.thedailybeast.com/articles/2014/05/27/exclusive-texas-va-run-like-a-crime-syndicate-whistleblower-says.html (last visited Nov. 7, 2014). The Inspector General Report confirmed that "[i]nappropriate scheduling practices are a systemic problem nationwide." Inspector General Report, at 65.

Recent VA cover-ups have not been limited to hospital wait times. In Pittsburgh, Pennsylvania, for example, six veterans died and 22 others became ill following an outbreak of Legionnaires' disease. *See* Senate Oversight Report at 30. VA officials allegedly knew of the outbreak for more than a year, yet failed to notify patients or take other precautions to stop the disease from spreading. *VA Hospital Knew Human Error Caused Legionnaires' Outbreak*, CBS News, March 13, 2014, *available at http://www.cbsnews.com/news/va-hospital-knew-human-error-caused-legionnaires-outbreak* (last visited Nov. 7, 2014).

These examples are just a few of the recent scandals that are currently known, though there may be countless other cover-ups being carried out by the VA that may not be revealed until farther in the future. If VA employees are able to conceal or falsify evidence for more than two years, veterans and their families could be left without a remedy under the FTCA in the absence of equitable tolling.

While congressional efforts to hold those responsible for the failures within the VHA system accountable are laudable, it should not be undercut by strained interpretations of existing laws and rules that can provide appropriate redress to veterans.

B. The Disproportionate Impact Of Cognitive Impairments On Veterans Render The Veteran Community Particularly Vulnerable To Abuse Of Process.

Veterans disproportionately suffer health complications involving cognitive impairments that may cause difficulty in understanding and meeting statutory filing deadlines. For example, nearly 700,000 veterans are compensated for post-traumatic stress disorder ("PTSD") alone. *VA Benefits & Health Care Utilization*, U.S. Dep't of Veterans Affairs, *available at http://www.va.gov/vetdata/docs/pocketcards/fy2014q4.pdf* (last updated July 11, 2014). In addition, more than 300,000 veterans and active military personnel have been diagnosed with traumatic brain injury ("TBI") since 2002. *See DoD Worldwide Numbers for TBI*, Defense and Veterans Brain Injury Center, *available at http://dvbic.dcoe.mil/dod-worldwide-numbers-tbi* (last visited Nov. 7, 2014). Veterans inflicted with these conditions frequently suffer from memory loss, confusion, concentration problems, and dementia.

As a result of these mental conditions, as well as other factors such as poverty, the lack of support networks, substance abuse issues, and often a lack of transferable skills for employment in the civilian workforce, veterans disproportionately represent a large percentage of the homeless population in the United States. Veterans make up approximately 12 percent of the homeless adult population, and approximately 150,000 homeless veterans receive specialized health care treatment from the VA each

year. *See Homeless Veterans Background & Statistics*, Nat'l Coalition for Homeless Veterans, *available at http://nchv.org/index.php/news/media/background_and_statistics* (last visited Nov. 7, 2014). Roughly 50 percent of homeless veterans suffer from a serious mental illness and about 70 percent have substance abuse problems. Moreover, homeless veterans often lack a mailing address, transportation, telecommunications, internet access, and other key resources, making it even more difficult for them to be aware of and fulfill statutory deadlines.

These mental health issues and other life challenges that plague the veteran community, along with the VA's demonstrated penchant for obfuscating the deficiencies in the care it provides, combine to create a frightening mosaic that begs for the applicability of equitable doctrines that prevent injustice to the veteran community. Equitable tolling is such a doctrine, and its applicability to the FTCA should be affirmed.

IV. This Court's Application Of The Common-Law "Discovery Rule" To The FTCA's Statute Of Limitations Requires Upholding "Equitable Tolling" As Well.

Finally, the position advanced by the Government here is antithetical to this Court's embrace of equitable, common-law doctrines when applying the FTCA's statute of limitations in medical malpractice cases brought by veterans against the United States. In *United States v. Kubrick*, 444 U.S. at 113, this Court held that, in medical malpractice cases, the FTCA's two-year statute of limitations begins to run only when the plaintiff knows of both the existence of

his injury and its cause. The Court reasoned that a plaintiff ignorant of his legal rights did not stand on the same footing as a plaintiff ignorant of the fact of his injury or its cause, because the injury in fact "may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.* at 122. In contrast, the plaintiff who is aware of both his injury and who inflicted it is "no longer at the mercy of the latter" and may in the exercise of reasonable diligence discover the necessary facts to bring his claim. *Id.*

Importantly, the Court's adoption of the common-law "discovery rule" of accrual in *Kubrick* was a departure from the "general rule" that a tort claim accrues at the time of plaintiff's injury. *Id.* at 121 n.7. The Court's departure from the "general rule" of accrual in favor of the "discovery rule" in this context is particularly notable given the Court's reticence to "graft a discovery rule" onto statutes of limitations absent "textual, historical, or equitable reasons." *See Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013).

The "discovery rule" established by this Court in *Kubrick* has since been applied to FTCA claims countless times by the Courts of Appeal and other courts. *See, e.g., Miller v. Phila. Geriatric Ctr.*, 463 F.3d 266, 271 (3d Cir. 2006) (FTCA claims involving medical malpractice "accrue not at the time of injury, but rather when a plaintiff knows of both the existence and the cause of his injury."); *Nemmers v. United States*, 795 F.2d 628, 629 (7th Cir. 1986) ("The time starts to run in a medical malpractice case when the plaintiff has the information necessary to

discover 'both his injury and its cause.'"); *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011) ("The diligence-discovery rule sets the accrual date at the time when, with reasonable diligence, the plaintiff has or . . . should have discovered the critical facts of both his injury and its cause.") (citations omitted).

This Court's adoption of the common-law discovery rule to medical malpractice claims under the FTCA supports the application of equitable tolling to such claims. For example, in *Arteaga v. United States*, 711 F.3d 828, 833 (7th Cir. 2013), the Seventh Circuit correctly held that the FTCA's statute of limitations could be equitably tolled in certain circumstances. Judge Posner wrote that the discovery rule as applied to the FTCA by this Court in *Kubrick* "bolstered" the Seventh Circuit's decision: "as a practical matter the discovery rule extends the statute of limitations by delaying the date on which it begins to run. Yet despite the rule's being a common law rule rather than part of the Federal Tort Claims Act, it has long been accepted as fully applicable to suits under the Act." *Id.*[8]

In light of the above, the Government's reliance on *Kubrick* is sorely misplaced. *See* Brief of Petitioner at 29-30. The Government cited *Kubrick* for the

---

[8] Similarly, the Ninth Circuit in *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1048 (9th Cir. 2013) likewise relied on this Court's application of the discovery rule to hold that equitable tolling applied to claims under the FTCA: the "[a]pplication of a common law discovery rule not enunciated in the statute to aspects of § 2401(b) reinforces the notion that the FTCA's statutes of limitations admit of common law exceptions." *Id.*

proposition that when the United States waives its sovereign immunity, the statute of limitations acts as a condition on that waiver, and the Court "'should not take it upon [itself] to extend the waiver beyond that which Congress intended.'" *Id.* (quoting *Kubrick*, 444 U.S. at 117-18). Yet, mindful of that principle, this Court nevertheless grafted a *common-law* doctrine onto Section 2401(b), found nowhere in the text of the FTCA, which requires federal courts to engage in a fact-intensive inquiry to determine when a plaintiff knew or should have known of both his injury *and its cause*. The Government provides no argument as to how "equitable tolling" extends the United States' waiver of sovereign immunity any further than the discovery rule. The Government's inability to do so confirms that this Court should affirm the applicability of equitable tolling to the FTCA.

On the other hand, a holding in favor of the Government that equitable tolling does not apply would require this Court to reconsider *Kubrick* or find some defensible and administrable basis of distinguishing the application of an equitable common-law doctrine to the FTCA's statute of limitations in the case of accrual, but not doing so in the case of tolling. The Court should not, and cannot, do so.

As an initial matter, beyond the prudential considerations of *stare decisis*, this Court should not overturn *Kubrick*'s holding that the "discovery rule" applies in determining the accrual of medical malpractice claims under the FTCA. As discussed above, the Courts of Appeals have consistently applied – and America's veterans have relied upon – *Kubrick*'s holding for 35 years. Additionally, as described in Parts II & III, *supra*, veterans overwhelmingly rely

on the VA for medical care, and already face numerous obstacles to vindicating their rights when injured by the VA. Injuries from medical malpractice are frequently latent and present themselves years after the "injury" is inflicted. Recent events also show that the VA has a proclivity for concealing evidence from veterans as to the cause of their injuries. Thus, any ruling that did not preserve the discovery rule would be extremely prejudicial to veterans as a group, and *amici curiae* urge the Court to consider carefully how a ruling in favor of the Government would affect the applicability of the discovery rule to Section 2401(b), and at the very least to preserve the status quo applicability of the discovery rule.[9]

Additionally, any attempt to draw a meaningful distinction between the application of the "discovery rule" and the application of "equitable tolling" would be difficult to administer by lower courts. Courts should not be forced to make gossamer distinctions between whether the FTCA's statute of limitations did not expire because the plaintiff was unaware of "the cause" of her injury or did expire because the existence of the claim was fraudulently concealed after the fact.

---

[9] Although the Government has only challenged the application of "equitable tolling" to the FTCA, courts have noted the confusion between the "fraudulent concealment" doctrine of equitable tolling and the discovery rule. *See, e.g.*, *SEC v. Gabelli*, 653 F.3d 49, 59-60 (2d Cir. 2011) (noting "the all-too-common mistake by which the discovery rule is sometimes confused with the concept of fraudulent concealment of a cause of action" (citations and quotations omitted)). Should the Court decide in favor of the Government here, *amici* encourage the Court to expressly exclude the "discovery rule" from its decision.

The facts of the *June* case present a ready-made illustration. When Anthony Booth was killed in the fateful automobile accident, his estate argued that his claim had not accrued because through "reasonable diligence" his estate could not have known that the defective guard rail was the cause of his death. *See June v. United States*, No. 11-901-PHX-SRB, Order Granting Mot. to Dismiss at 3-4, (D. Ariz. Nov. 1, 2011) ECF No. 19. This was because the Federal Highway Administration allegedly concealed information about the fitness of those guard rails. *Id.* Assuming the "discovery rule" applied, but equitable tolling did not, would the claim be saved because plaintiff could not have known of "the cause" of Booth's death, or barred because the claim was merely fraudulently concealed? This example suggests two things: First, the distinctions between accrual and tolling are often arbitrary and amorphous and the survival of a claim should not depend upon the outcome. Second, making such distinctions would do nothing to encourage transparency by federal agencies, especially when litigation is pending or threatened. Given the existing lack of transparency of the VA described in detail above, such an outcome is not only unsound policy, but it is inconsistent with Congress's intent in passing the FTCA.

CONCLUSION

For the foregoing reasons, as well as those offered by Respondent, the decision of the court below should be affirmed.

Respectfully submitted,

Rani Habash
DECHERT LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 261-3430

Joshua D. N. Hess
Counsel of Record
Mark DiPerna
Carl Gismervig
Jonathan Massey
DECHERT LLP
One Bush Street,
Suite 1600
San Francisco, CA
94104
(415) 262-4500

Counsel for Amici Curiae

November 12, 2014

AMICUS CURIAE BRIEF

Nos. 13-1074 and 13-1075

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KWAI FUN WONG,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

MARLENE JUNE,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PROFESSOR GREGORY C. SISK AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

GREGORY C. SISK
Counsel of Record
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LaSalle Avenue
Minneapolis, Minnesota 55403
(651) 962-4923
gcsisk@stthomas.edu
Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. While the Federal Government's Consent to Suit by a Clear Legislative Statement is a Jurisdictional Prerequisite, the Terms and Limitations of an Express Statutory Waiver are Not to be Strictly Construed 6

A. This Court's Strict and Jurisdictional Inquiry Applies to the Threshold Demand for a Clear Statement Waiving Federal Sovereign Immunity 6

B. This Court No Longer Imposes a Strict Construction on Other Provisions in the Statute After Finding an Unequivocal Waiver of Federal Sovereign Immunity 9

II. Statutory Time Limits in Government Cases are Presumptively Non-Jurisdictional in Nature and Applied in a Manner Consistent With Ordinary Expectations in Civil Litigation 12

A. Because Congress Must Be Presumed to Adopt Limitation Rules in the Light of Background Principles of Civil Litigation, This Court has Established a Rebuttable Presumption in Favor of Equitable Tolling 12

TABLE OF CONTENTS – Continued

Page

B. The *Stare-Decisis* Detour in *John R. Sand & Gravel* is a Narrow Exception to the General Expectation That Time Limits in Government Suits are Subject to Equitable Tolling 17

III. The Federal Tort Claims Act Waives Sovereign Immunity in Sweeping Language, Precluding a Strict and Jurisdictional Reading of Its Substantive Provisions, Limitations, and Exceptions 23

A. The FTCA Expressly Confers Jurisdiction in a Single and Specific Section, Which This Court has Identified as Setting the Jurisdictional Parameters of the Statute 23

B. The FTCA Generally Places the United States on Equal Footing With Private Parties and Should be Interpreted Against the Backdrop of the Common Law of Torts 29

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES:

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006).....23

Arteaga v. United States, 711 F.3d 828 (7th Cir. 2013).....32

Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104 (1991).....21

Bailey v. Glover, 88 U.S. 342 (1874).....21

Block v. Neal, 460 U.S. 289 (1983).....27

Bowen v. City of New York, 476 U.S. 467 (1986).....13

Carter v. McHugh, 869 F. Supp. 2d 784 (W.D. Tex. 2012).....2

Collins v. United States, 564 F.3d 833 (7th Cir. 2008).....2

Dalehite v. United States, 346 U.S. 15 (1953).....30, 31, 33

Dolan v. U.S. Postal Service, 546 U.S. 481 (2006).....4, 28, 29

Eastern Transp. Co. v. United States, 272 U.S. 675 (1927).....7

Erickson Air Crane Co. v. United States, 731 F.2d 810 (Fed. Cir. 1984).....11

FAA v. Cooper, 132 S. Ct. 1441 (2012).....3

Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994).....25, 26, 27

Feres v. United States, 340 U.S. 135 (1950).....4, 24, 25

TABLE OF AUTHORITIES – Continued

Page

Ferrall v. Irvine, 12 Iowa 52 (Iowa 1861) 20

Finn v. United States, 123 U.S. 227 (1887) 18, 19

Franconia Associates v. United States, 536 U.S. 129 (2002) 22, 23

Gomez-Perez v. Potter, 553 U.S. 474 (2008) 3, 10

Gonzalez v. Thaler, 132 S. Ct. 641 (2012) 9

Henderson v. United States, 517 U.S. 654 (1996) 13

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 21

Indian Towing Co. v. United States, 350 U.S. 61 (1955) 27

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990) .....*passim*

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 17, 18, 19

Kendall v. United States, 107 U.S. 123 (1883).....18, 19

Lane v. Pena, 518 U.S. 187 (1996) 29

Lehman v. Nakshian, 453 U.S. 156 (1981) 7

Miller v. Trustees of Jefferson College, 13 Miss. 651 (Miss. 1846) 20

Olson v. United States, 546 U.S. 43 (2006).....30

Orff v. United States, 545 U.S. 596 (2005).....11

Partlow v. Jewish Orphans' Home of Southern California, 645 F.2d 757 (9th Cir. 1981) 22

TABLE OF AUTHORITIES – Continued

Page

Perez v. United States, 167 F.3d 913 (5th Cir. 1999) 6, 33

Proprietors of White School House v. Post, 31 Conn. 240 (Conn. 1862) 20

Public Serv. Co. v. General Elec. Co., 315 F.2d 306 (10th Cir. 1963) 22

Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 16

Richards v. United States, 369 U.S. 1 (1962) 30

Richlin Security Service Co. v. Chertoff, 553 U.S. 571 (2008) 10

Sanger v. Nightingale, 122 U.S. 176 (1887) 20, 21

Scarborough v. Principi, 541 U.S. 401 (2004) 15, 16

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 27, 28

Stone v. Sanders, 38 Tenn. 248 (Tenn. 1858) 20

Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116 (Fed. Cir. 2007) 2

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 13

United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949) 31

United States v. Beggerly, 524 U.S. 38 (1998) 17

United States v. Brockamp, 519 U.S. 347 (1997) 17

United States v. Kubrick, 444 U.S. 111 (1979) 31, 32

TABLE OF AUTHORITIES – Continued

Page

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 7

United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011) 2

United States v. White Mt. Apache Tribe, 537 U.S. 465 (2003) 7, 10

United States v. Yellow Cab Co., 340 U.S. 543 (1951) 31

Young v. United States, 535 U.S. 43 (2002) 16

CONSTITUTION:

Art. I, § 9, cl. 7 8

STATUTES:

28 U.S.C. § 1346(b)(1) 23, 25, 26, 29

28 U.S.C. § 2401 26

28 U.S.C. § 2401(b) 32

28 U.S.C. § 2501 ..... 18, 22

28 U.S.C. § 2674 ..... 5, 29, 30

28 U.S.C. § 2679(a) 25

28 U.S.C. § 2680 27

28 U.S.C. § 2680(k) 28

42 U.S.C. § 2000e-16 14

Act of Mar. 3, 1863, ch. 92, 12 Stat. 765 19

Act of Aug. 5, 1886, 24 Stat. 335 20

TABLE OF AUTHORITIES – Continued

Page

Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306 15

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 14

Fair Labor Standards Act, 61 Stat. 84 (1947) 22

Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 ..... *passim*

LEGISLATIVE MATERIALS:

Cong. Globe, 37th Cong., 3rd Sess. (1863) 21

H.R. Rep. No. 79-1675 (1945) 30

H.R. Rep. No. 89-1532 (1966) 15

S. Rep. No. 89-1327 (1966) 15

TREATISES:

Joseph K. Angell, *A Treatise on the Limitation of Actions at Law and Suits in Equity and Admiralty* (Little Brown & Co., 4th ed. 1861) 20

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (West 2012) 4

Gregory C. Sisk, *Litigation With the Federal Government* (ALI-ABA, 4th ed. 2006 & Supp. 2012) 1, 31

Gregory C. Sisk, *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & Update 2014) 1

TABLE OF AUTHORITIES – Continued

Page

LAW JOURNAL ARTICLES:

Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109 (2010) 7

Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174 (2000) 5

Jacob Damrill, Note, *Waves of Change Towards a More Unified Approach: Equitable Tolling and the Federal Tort Claims Act*, 50 Tulsa L. Rev. 271 (2015) 32

Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207 (2009) 8

Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521 (2003) 8

Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529 (1992) 8

John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399 (2010) 8

John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001) 5, 30

TABLE OF AUTHORITIES – Continued

Page

John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771 7

Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950) 16

Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517 (2008) 4, 13, 18, 19, 27

Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 Vill. L. Rev. 899 (2010) 8

Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245 (2014) 3, 11, 12

Howard Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy*, 102 Nw. U. L. Rev. Colloquy 215 (2008) 24

LITIGATION DOCUMENTS:

Brief for the Respondent, *Scarborough v. Principi*, 541 U.S. 401 (2004) (No. 02-1657) 15

Supplemental En Banc Opening Brief of the United States, *Kwai Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (en banc) (No. 10-36136) 32

STATEMENT OF INTEREST OF AMICUS CURIAE

As amicus curiae and the author of this brief, my name is Gregory C. Sisk.[1] I hold the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). My only interest in this matter is that of a legal scholar studying the jurisprudence of federal sovereign immunity and statutory waivers.

For more than a quarter of a century, my scholarly work has focused on civil litigation with the Federal Government. I have published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (ALI-ABA, 4th ed. 2006 & Supp. 2012); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & Update 2014). The treatise and the casebook each include a chapter devoted primarily to the Federal Tort Claims Act. I also have written several law review articles on federal sovereign immunity and construction of statutory waivers of federal sovereign immunity, some of which are cited and adapted into this brief.

---

[1] The parties in both cases have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief other than me as amicus curiae and my employer (the University of St. Thomas, which provides a professional development fund to each faculty member to support scholarly and public service work).

My scholarly publications on Federal Government litigation are cited regularly by the federal courts. *See, e.g.*, *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723, 1729 (2011); *Collins v. United States*, 564 F.3d 833, 836 (7th Cir. 2008); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1123 n.12 (Fed. Cir. 2007); *Carter v. McHugh*, 869 F. Supp. 2d 784, 787 (W.D. Tex. 2012) (addressing the issue of equitable tolling under the FTCA).

In addition to my teaching and scholarly work, I continue to practice law, primarily on a pro bono basis. As a former appellate attorney with the Civil Division of the U.S. Department of Justice and now as a private attorney, I have litigated cases on behalf of both the Government and private parties under statutory waivers of federal sovereign immunity.

SUMMARY OF THE ARGUMENT

The Government's plea for rigid application of time limitations to resist claims of tortious harm undermines the congressional purpose for a remedial statute expressly making the United States liable in the same way as a private person. The Government's strict construction approach contradicts this Court's line of decisions denying special solicitude to the United States in applying limitations periods. This amicus curiae brief seeks to place these controversies in the

larger context of this Court's coalescing jurisprudence of statutory waivers of federal sovereign immunity.

Since the dawn of the twenty-first century, this Court has moved ever more deliberately toward an interpretive approach that reserves jurisdictional analysis, strict construction, and presumptions in favor of the Government to core questions about whether sovereign immunity has been expressly waived and the basic scope of that waiver. *See FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (stating that the demand for an "unequivocally expressed" waiver of sovereign immunity extends to "*scope* of that waiver"); *see generally* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1300 (2014).

By contrast, for other terms, definitions, exceptions, limitations, and procedures in a statutory waiver of federal sovereign immunity, ordinary rules of statutory interpretation and typical expectations for civil litigation generally govern. *See Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (holding that when a "statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision," other provisions and terms "'need not . . . be construed in the manner appropriate to waivers of sovereign immunity'" (citations omitted)); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (establishing a "rebuttable presumption" that the same rule of equitable tolling of statutes of limitations "applicable to suits against private defendants should also apply to suits against the United States").

In this way, "[a]n early jaundiced judicial attitude has resolved into a greater respect for the legislative pledge of relief to those harmed by their government." Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 521-22 (2008); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 285 (West 2012) (characterizing the supposed corollary that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" as having "made sense when suits against the government were disfavored, but not in modern times").

In the particular context of the Federal Tort Claims Act (FTCA), the Court has most emphatically moved away from strict construction of statutory waivers of sovereign immunity, instead ensuring that the congressional promise of relief to those harmed by tortious actions of government actors is upheld. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, 491-92 (2006) (noting that the interpretation of an exception to liability did not implicate a rule of strict construction, which is "'unhelpful' in the FTCA context" given that the statute "'waives the Government's immunity from suit in sweeping language'" (citations omitted)). Statutory provisions that "prescribe the test of allowable claims" and exceptions to liability fall within the court's jurisdiction to grant or deny a claim, but they are not jurisdictional rules in and of themselves. *See Feres v. United States*, 340 U.S. 135, 140-41 (1950).

Remembering that the FTCA is a *waiver* of sovereign immunity to permit tort suits against the United States, actions alleging tortious harm by federal actors ordinarily should proceed in a manner consistent with private party litigation, *see* 28 U.S.C. § 2674, and against "the backdrop of common law rules of tort law." *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 114 (2001) (stating also "that [federal] statutes of limitations must be read against the embedded practice of equitable tolling").

ARGUMENT

Although the Federal Tort Claims Act (FTCA) is a clear and unequivocal waiver of federal sovereign immunity, the Government nonetheless insists that the time limitations in the statute be considered against the "background assumption that such time bars would be *strictly construed* not to permit equitable tolling." Pet. Br. (Wong) at 16 (emphasis added); Pet. Br. (June) at 12 (emphasis added). *See also* Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174, 178 (2000) (in this law review article cited repeatedly by the Government to support its case against equitable tolling, the authors "start with the basics" that the FTCA "must be *strictly construed*" (emphasis added)).

Moreover, despite the "garden variety" nature of the statute of limitations found in the FTCA, *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999), the Government asks for the privileged benefit of an absolute *jurisdictional* rule that, unlike ordinary expectations in civil litigation, need not be pleaded as an affirmative défense and cannot be waived. *See* Pet. Br. (Wong) at 16; Pet. Br. (June) at 11-12.

Since the dawn of the century, however, this Court's increasingly common encounters with waivers of federal sovereign immunity have also become more conventional in interpretive attitude. This Court has recognized a dichotomy between the threshold and jurisdictional question of whether sovereign immunity has been waived (requiring a "clear statement" by Congress) and the inquiry into how the statutory waiver should be interpreted and applied (with the canon of strict construction fading away and ordinary tools of statutory interpretation prevailing).

I. While the Federal Government's Consent to Suit by a Clear Legislative Statement is a Jurisdictional Prerequisite, the Terms and Limitations of an Express Statutory Waiver are Not to be Strictly Construed

A. This Court's Strict and Jurisdictional Inquiry Applies to the Threshold Demand for a Clear Statement Waiving Federal Sovereign Immunity

The Federal Government's consent to suit must be expressed through unequivocal statutory text.

United States v. Nordic Village, Inc., 503 U.S. 30, 33-37 (1992). In other words, the courts indulge a "strong presumption against the waiver of sovereign immunity." *See Lehman v. Nakshian*, 453 U.S. 156, 162 n.9 (1981); *see also Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927) (saying that "[t]he sovereignty of the United States raises a presumption against its suability, unless it is clearly shown").

For the Federal Government to be amenable to any suit on a particular theory of liability and for a specific type of remedy, an unambiguous waiver by statute must be shown. In short, jurisdiction lies only when there is "a clear statement from the United States waiving sovereign immunity." *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003); *see generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109, 145-50 (2010); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 773-76, 796-98, 806. Thus, as a jurisdictional precondition to adjudicating a claim against the Government, the preliminary question of whether sovereign immunity has been waived must be addressed by a court on its own initiative.

The premise of "sovereign immunity" is that a government remains exempt from court action unless that government lifts the shield by granting permission to suit. That baseline concept of federal sovereign immunity may be defended as "maintain[ing] a proper balance among the branches of the federal government, and from a proper commitment

to majoritarian rule." Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1530 (1992); *see also* Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 Vill. L. Rev. 899, 900 (2010) (arguing that sovereign immunity "enhances democratic rule and fortifies the separation of powers between the political and judicial branches").

Moreover, the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, "lends force to the argument that money judgments against the United States cannot be *paid* without an appropriation from Congress." Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 545 (2003); *see also* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1258 (2009); John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 437 n.192 (2010).

By presuming that federal sovereign immunity remains in place absent a clear indication to the contrary through an act of Congress, the Judiciary respectfully allows the political branches to decide when opening the courthouse doors to legal grievances by the subjects of government is morally justified. However, once Congress has acted to permit the claim of the aggrieved against the sovereign to be pursued in a judicial forum, the courts should not frustrate the legislative promise of relief by reconstructing a broader scope of immunity through a misplaced

jurisdictional analysis or a hostile and narrow construction of the statute.

An all-consuming jurisdictional-style imperative for each element of a statutory waiver of federal sovereign immunity would have "drastic" consequences because "[s]ubject-matter jurisdiction can never be waived or forfeited," "objections may be resurrected at any point in the litigation," and courts are obligated to consider jurisdictional requirements sua sponte. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). The federal courts would be obliged to identify and thoroughly explore each item on an exhaustive (and exhausting) list of every element, limitation, exception, procedural requirement, and time period that conceivably could be invoked as a condition of the statutory waiver of sovereign immunity. Individual claimants would suffer the injustice of not being able to rely upon decisions by government litigators to waive or concede defenses and would be denied equitable accommodations common to civil litigation.

B. This Court No Longer Imposes a Strict Construction on Other Provisions in the Statute After Finding an Unequivocal Waiver of Federal Sovereign Immunity

Putting strict and jurisdictional analysis in its place, this Court has separated the threshold question of *whether* a waiver of sovereign immunity exists

from subsequent questions as to *how* the terms of that waiver should be understood and applied. As to the former, something akin to a "strict construction" or jurisdictional approach continues to apply. On the latter question, strict construction has faded into the background and the ordinary tools of statutory interpretation have moved to the fore.

In *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), this Court most clearly articulated the crucial difference between the preliminary question of whether a statutory waiver of sovereign immunity exists for the subject matter of the suit and later questions about the meaning of substantive provisions and other terms inside the statutory waiver. "[W]here one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision," the Court explained, "that latter provision 'need not . . . be construed in the manner appropriate to waivers of sovereign immunity.'" *Gomez-Perez*, 553 U.S. at 491 (quoting *White Mt. Apache Tribe*, 537 U.S. at 472-73).

Accordingly, the *Gomez-Perez* Court stated, where one provision in a statute "unequivocally waives sovereign immunity," another provision that defines the substantive standard of liability need not "surmount the same high hurdle" of interpretive clarity. *Id.*; *see also Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008) (rejecting the Government's attempt to "seek[ ] shelter" in the canon of strict construction when interpreting a provision allowing awards of fees and expenses against the

Government); *see generally* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1273-76 (2014).

To be sure, the demand for an unequivocal statutory waiver of federal sovereign immunity and a supposed rule of strict construction sometimes have merged together in judicial rulings. Clarity would be promoted and confusion avoided by consistently characterizing this first-stage analysis as demanding a "clear statement" that federal sovereign immunity has been waived.

In *Orff v. United States*, 545 U.S. 596, 601-02 (2005), for example, the Court held that an attempt by purported third-party beneficiaries to enforce a contract against the United States "founders on the principle that a waiver of sovereign immunity must be strictly construed in favor of the sovereign." However, the basis for the *Orff* decision was that no statute gave consent to a third-party beneficiary of a government contract "to sue the United States alone." *Id.* at 602; *see also Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (stating the basic and longstanding principle that "[t]he government consents to be sued only by those with whom it has privity of contract").

Accordingly, *Orff* was an example of the clear statement rule on the threshold question of whether sovereign immunity had been waived, not the application of a rule of strict construction in applying an

unequivocal waiver. Sisk, *supra*, 92 N.C. L. Rev. at 1266-67. The validity of the first rule (the clear statement requirement for adducing the existence of a waiver) does not entail continued acceptance of the second proposition (a privileged rule of statutory interpretation for the Government).

II. Statutory Time Limits in Government Cases are Presumptively Non-Jurisdictional in Nature and Applied in a Manner Consistent With Ordinary Expectations in Civil Litigation

A. Because Congress Must Be Presumed to Adopt Limitation Rules in the Light of Background Principles of Civil Litigation, This Court has Established a Rebuttable Presumption in Favor of Equitable Tolling

The traditional attitude of narrow construction in favor of the Government is now more attentively focused on the preliminary question of whether Congress has clearly consented to a type of claim and form of remedy. The arguments for strict construction and jurisdictional rules fade the further the analysis moves past the threshold question of the existence and general scope of a statutory waiver.

This Court's course toward "a less jaundiced approach toward statutory waivers of sovereign immunity is especially well marked in cases involving procedural regulation of the mode of litigation as

contrasted with the substantive scope of waiver legislation." Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 580 (2008); *see also Henderson v. United States*, 517 U.S. 654, 667-68 (1996) (holding that a prior provision in the Suits in Admiralty Act requiring that service of a suit against the Government be made "forthwith" was not jurisdictional because it fell into the category of statutory provisions that have a "'procedural' cast" and "deal with case processing, not substantive rights or consent to suit" (citations omitted)). And under American common law, statutes of limitations traditionally have been understood to be "procedural restrictions" rather than "substantive provisions." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-26 (1988) (discussing choice of law principles).

As an important illustration of the reservation of jurisdictional scrutiny to the core question of whether sovereign immunity has been waived, this Court has regularly turned aside the Government's insistence that statutory time limits should be treated as jurisdictional conditions on the waiver of sovereign immunity.

In *Bowen v. City of New York*, 476 U.S. 467, 478-79 (1986), the Court rejected the Government's argument that the statute of limitations for disability benefit claims under the Social Security Act is "jurisdictional," instead characterizing the provision as "a period of limitations" that may be equitably tolled.

In the landmark decision of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 91-92 (1990), the Court reversed the lower court's ruling that the statutory filing deadline for Title VII employment discrimination claims against the Federal Government "operates as an absolute jurisdictional limit." Even while recognizing that the limitations period for Title VII suits is a "condition to the waiver of sovereign immunity," the Court held that "the rule of equitable tolling [is] applicable to suits against the Government, in the same way that is applicable to private suits." *Id.* at 94-95.

Importantly, *Irwin* did not merely resolve a specific question for a particular statute of limitations, but rather adopted "a more general rule" to supersede the "ad hoc" approach that had produced "continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95. The Court ruled "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96.

Significantly for present purposes, this Court in *Irwin* applied the "rebuttable presumption of equitable tolling" as reflecting likely congressional intent on the limitations period for the employment discrimination provisions of Title VII when extended to the Federal Government as an employer in 1972. Equal Employment Opportunity Act of 1972, § 11, Pub. L. No. 92-261, 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16). The Title VII statute construed in *Irwin*

thus had been enacted nearly contemporaneously with the congressional expansion of the FTCA statute of limitations six years earlier. Act of July 18, 1966, Pub. L. No. 89-506, §§ 2(a), 7, 80 Stat. 306, 307.

Congress in 1972 extended Title VII to afford more equitable treatment of federal employees and to hold the United States more equally to the same prohibition on employment discrimination that applied to private parties. Congress in 1966 eased the limitations rules of the FTCA for the "purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." H.R. Rep. No. 89-1532, at 5 (1966); S. Rep. No. 89-1327, at 2-3 (1966).

Subsequent to *Irwin*, the Court held that an otherwise-timely application for attorney's fees under the Equal Access to Justice Act, which did not contain the statutorily-required allegation that the Government's position was not "substantially justified," could be amended to cure this defect after the 30-day filing period had expired. *Scarborough v. Principi*, 541 U.S. 401, 420-421 (2004). There too, the Federal Government insisted that "[t]he requirement of filing a timely fee application that has the prescribed content is a condition on the federal government's waiver of sovereign immunity" and thus must be strictly applied. Brief for the Respondent at 18-19, *Scarborough v. Principi*, 541 U.S. 401 (2004) (No. 02-1657).

In *Scarborough*, this Court reiterated that "[o]nce Congress waives sovereign immunity, we observed [in *Irwin*], judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts to little, if any, broadening of the congressional waiver.'" *Scarborough*, 541 U.S. at 421 (quoting *Irwin*, 498 U.S. at 95).

The Court's treatment of time limitations in suits against the Government in a manner consistent with ordinary expectations arising in private litigation stands in contrast with the stricter approach toward those statutory provisions that grant the essential permission to sue. This reflects an appreciation of the distinct differences in nature and purpose between these types of provisions. The primary purpose of a statute of limitations is fairness to the defendant and efficiency of the litigation process, *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950), rather than protection of the sovereign Government from unconsented claims. And given that the availability of equitable tolling is "hornbook law," "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002).

B. The *Stare-Decisis* Detour in *John R. Sand & Gravel* is a Narrow Exception to the General Expectation That Time Limits in Government Suits are Subject to Equitable Tolling

On occasion, with an exceptional statute of limitations in a statutory waiver of federal sovereign immunity, this Court has found the *Irwin* presumption in favor of equitable tolling to be rebutted. In *United States v. Brockamp*, 519 U.S. 347, 352 (1997), the Court found that the statutory limitations period on filing claims for tax refunds could not be equitably tolled due to the tax statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions." In *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998), the Court held that equitable tolling is not available in a suit against the United States under the Quiet Title Act, which provides an "unusually generous" twelve-year limitations period.

The Court reached these conclusions in *Brockamp* and *Beggerly* based upon distinct and exceptional characteristics of these particular statutory time limits – not by characterizing a statute of limitations as a jurisdictional requirement or by reciting a formulaic commitment to strict construction.

The narrow exception to this pattern is *John R. Sand & Gravel v. United States*, 552 U.S. 130 (2008), where the Court held that the statute of limitations for money claims in the Court of Federal Claims,

28 U.S.C. § 2501, was jurisdictional in nature and not subject to exceptions. Importantly, rather than discarding *Irwin* or questioning the rebuttable presumption for equitable tolling of limitations periods for suits against the Government, the Court invoked *stare decisis* to adhere to nineteenth century cases which had declared this particular statute of limitations to be jurisdictional. *Id.* at 134-39; *see also* Sisk, *supra*, 50 Wm. & Mary L. Rev. at 525 (characterizing *John R. Sand & Gravel* as a "*stare decisis*-justified detour").

The Court in *John R. Sand & Gravel* forthrightly fixed its strict and jurisdictional reading of a particular statute of limitations squarely and narrowly on *stare decisis* and disclaimed an intent to divert from the path that the law of federal sovereign immunity has taken in recent decades. Indeed, this Court acknowledged there had been "a turn in the course of the law," specifically in the interpretation of statutes of limitations in government cases, which now "place[s] greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting public funds." *John R. Sand & Gravel*, 552 U.S. at 138. Older decisions such as *Kendall v. United States*, 107 U.S. 123 (1883), and *Finn v. United States*, 123 U.S. 227 (1887), while preserved in their specific application by *stare decisis*, "have consequently become anomalous," *see John R. Sand & Gravel*, 552 U.S. at 138, and thus not to be extended to other situations or statutes.

Notably, by relying so heavily on the early Tucker Act decisions of *Kendall* and *Finn*, the Government effectively does an end-run around the central question of statutory intent. *See* Pet. Br. (Wong) at 22, 23, 24, 30, 32, 40, 43; Pet. Br. (June) at 20, 21, 28, 29, 38, 40, 41. To the extent that the FTCA statute of limitations is similar in language to the Tucker Act statute of limitations, then what the Government calls "traditional tools of statutory construction" should be central. *See* Pet. Br. (Wong) at 20; Pet. Br. (June) at 17.

But *Kendall* and *Finn* were exercises in judicial implication of jurisdictional absolutes rather than models of statutory interpretation focused on the text, historical context, and legislative history. Indeed, the Court in *Finn* acknowledged departing from "the ordinary legal principle that 'limitation . . . is a defence [that a defendant] must plead.'" *John R. Sand & Gravel*, 552 U.S. at 135 (characterizing and quoting *Finn*, 123 U.S. at 232-33). Instead, *Kendall* and *Finn* "are perhaps best understood as the Supreme Court's hesitant and skeptical introduction to what was then a new category of legislation that afforded general judicial remedies against the government for monetary claims based on governmental wrongs." Sisk, *supra*, 50 Wm. & Mary L. Rev. at 551.

Returning to first principles of statutory interpretation, Congress began in the nineteenth century to craft federal statutes of limitations to say that a claim is "forever barred" when not timely filed after accrual. *See, e.g.*, Act of Mar. 3, 1863, ch. 92, § 10, 12

Stat. 765, 767 (providing that claims against the United States in the Court of Claims "shall be forever barred" unless filed within six years after accrual); Act of Aug. 5, 1886, 24 Stat. 335 (providing that persons making claims against the United States as to certain lands in the District of Columbia must appear in court to litigate the claim after public notice or they "shall be deemed forever barred from setting up or maintaining any right, title, interest or claim in the premise").

In doing so, Congress unremarkably adapted language from ordinary state statutes of limitations of that period. *See* Joseph K. Angell, *A Treatise on the Limitation of Actions at Law and Suits in Equity and Admiralty* xxxiii to clxi (Little Brown & Co., 4th ed. 1861) (setting out state statutes of limitations). *See, e.g.*, *Proprietors of White School House v. Post*, 31 Conn. 240, 253-54 (Conn. 1862); *Ferrall v. Irvine*, 12 Iowa 52, 54 (Iowa 1861); *Stone v. Sanders*, 38 Tenn. 248, 250 (Tenn. 1858); *Miller v. Trustees of Jefferson College*, 13 Miss. 651, 661 (Miss. 1846).

In *Sanger v. Nightingale*, 122 U.S. 176 (1887), a diversity of citizenship case, the Court considered a Georgia statute providing that actions upon a debt which accrued during the Civil War had to be filed "by first January, 1870, or both the right and right of action to enforce it shall be forever barred." *Id.* at 184 (quoting Georgia statute). In response to the argument that this supposedly peremptory language "in effect destroys" an untimely claim, the Court cited to Georgia court rulings that this was "an ordinary

statute of limitations" that still had to be pleaded as an affirmative defense. *Id.* at 184-95.

When limitations language common to state litigation is incorporated into federal statutes, "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Assn. v. Solimino,* 501 U.S. 104, 108 (1991). Indeed, when enacting the statute of limitations for the then-Court of Claims in 1863 with the familiar "forever barred" phrasing, a leading senator stated: "As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals." Cong. Globe, 37th Cong., 3rd Sess. 414 (1863) (Sen. Sherman).

Beginning during this period and leading up to the date when the Federal Tort Claims Act was enacted, this Court has recognized that "the weight of judicial authority, both in this country and in England," favored the rule tolling a statute of limitations, both in law and equity, when a claim had been fraudulently concealed by the defendant. *Bailey v. Glover*, 88 U.S. 342, 347-49 (1874); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("This equitable doctrine [tolling the statute of limitations when the plaintiff has been injured by fraud] is read into every federal statute of limitation.").

Congress has integrated the "forever barred" phrase in many other statutes in the ensuing decades, statutes that have been understood to be subject to

equitable tolling. *See, e.g.*, *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306, 311 (10th Cir. 1963) (rejecting argument that the Clayton Act statute of limitations, 69 Stat. 283 (1955), which provides that an antitrust cause of action "shall be forever barred" unless commenced within four years, is "absolute" and instead holding that it is tolled by fraudulent concealment); *Partlow v. Jewish Orphans' Home of Southern California*, 645 F.2d 757, 760-61 (9th Cir. 1981) (applying equitable tolling to the Fair Labor Standards Act statute of limitations, 61 Stat. 84, 88 (1947), which provides that a claim is "forever barred" if not filed within two years). As the Court of Appeals observed below, by the middle of the twentieth century, when the FTCA was enacted, the "forever barred" phrasing had become part of "congressional drafting conventions." Pet. App. (Wong) at 18a.

Indeed, when not bound by precedent on a specific point, this Court has recognized a government suit limitations period framed with "forever barred" language as a run-of-the-mill statute of limitations to be understood in the light of ordinary common-law principles. In *Franconia Associates v. United States*, 536 U.S. 129 (2002), after re-examining the text and historical context of the predecessor statute, the Court unanimously found 28 U.S.C. § 2501 to be an "unexceptional" statute of limitations, comparable in text to "[a] number of contemporaneous state statutes of limitations applicable to suits between private parties." *Id.* at 145. Rejecting the government's entreaty for a "special" rule of accrual to benefit the sovereign, the Court characterized the government's

proposition as "present[ing] an 'unduly restrictive' reading of the congressional waiver of sovereign immunity, rather than 'a realistic assessment of legislative intent.'" *Id.* (citations omitted).

III. The Federal Tort Claims Act Waives Sovereign Immunity in Sweeping Language, Precluding a Strict and Jurisdictional Reading of Its Substantive Provisions, Limitations, and Exceptions

A. The FTCA Expressly Confers Jurisdiction in a Single and Specific Section, Which This Court has Identified as Setting the Jurisdictional Parameters of the Statute

The Federal Tort Claims Act (FTCA) simultaneously waives sovereign immunity for tort claims against the United States and confers exclusive jurisdiction over such claims to the United States District Courts. 28 U.S.C. § 1346(b)(1). By virtue of being formulated as part and parcel of a new jurisdictional grant to the federal courts, the basic scope of this statutory waiver is coextensive with the parameters of federal subject matter jurisdiction.

Not every statutory provision that relates to the waiver of immunity for tort claims in the FTCA constitutes a jurisdictional imperative. "[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y&H*

Corp., 546 U.S. 500, 516 (2006); *see also* Howard Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy*, 102 Nw. U. L. Rev. Colloquy 215, 216 (2008) ("[C]ourts should consider a provision of positive law as jurisdictional only when its plain language is addressed to the court and speaks in terms of judicial power about the class of cases that courts can hear and resolve.").

This Court already has identified the specific location of the jurisdictional grant in the FTCA and defined its limited jurisdictional constraints:

First, in *Feres v. United States*, 340 U.S. 135, 140-41 (1950), one of the earliest decisions interpreting the FTCA, the Court explained that the statute "confers jurisdiction to render judgment upon all such claims," that is, over civil actions for money damages against the United States, "[b]ut it does not say that all claims must be allowed." "Jurisdiction of the defendant now exists where the defendant was immune from suit before," but the Court added, "it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law." *Id.* at 141.

In other words, the statutory section withdrawing immunity and granting authority to the District Court supplies the jurisdictional prerequisite. Other FTCA provisions that "prescribe the test of allowable claims" and "exceptions" to liability fall within the court's jurisdictional power to grant or deny a claim,

but are not jurisdictional rules in and of themselves. *See id.* at 140-41.

Second, in *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475-86 (1994), the Court considered whether the FTCA superseded a statute that generally permits a particular agency to "sue and be sued" and thereby precluded a direct claim for money damages against the agency for a constitutional violation. By express directive, the FTCA is the exclusive venue for suits against agencies that are authorized to "sue and be sued" in their own name *if* the claim is "cognizable" under the FTCA, 28 U.S.C. § 2679(a). Defining "cognizable" as meaning that a claim is within the adjudicative authority of a court, the Court ruled that this "inquiry focuses on the jurisdictional grant provided by § 1346(b)." *Meyer*, 510 U.S. at 476.

Examining Subsection 1346(b)(1), which speaks in the language of jurisdiction, the *Meyer* Court explained that it "grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed],' itself liable." *Meyer*, 510 U.S. at 477 (citations omitted). The jurisdictional parameters of the FTCA thus include that "category" of claims which "allege the six elements" outlined in Subsection 1346(b)(1), namely a claim (1) against the United States, (2) for money damages, (3) for personal injury, death, property harm, or property loss, (4) caused by the negligent or wrongful act or omission of any employee of the United States, (5) while acting

within the scope of his office or employment, (6) under circumstances where a private person would be liable under the law of the place where the act or omission occurred. *Id.*

In sum, when a tort claim against the United States alleges the six basic elements set out in Subsection 1346(b)(1), the claim "comes within this jurisdictional grant" of the FTCA. *Meyer*, 510 U.S. at 477. For jurisdictional purposes, we need look no further.

Bypassing these decisions, the Government suggests that other provisions in the FTCA are jurisdictional conditions by virtue of the provision in Subsection 1346(b)(1) that the court's exercise of jurisdiction over an FTCA claim is "[s]ubject to the provisions of chapter 171 of this title." *See* Pet. Br. (Wong) at 36; Pet. Br. (June) at 34; *see also* Pet. App. (Wong) at 53a-54a (Tashima, J., dissenting).

But this language in Subsection 1346(b)(1) is an unremarkable cross-reference to other elements of the FTCA – ranging from definitions through congressional reports to exceptions to liability. Some of these provisions are simply not susceptible to any jurisdictional reading and others are the substantive standards for and exceptions to liability presented elsewhere in the statute in non-jurisdictional form. In any event, the time limitations of the FTCA in Section 2401 are not part of Chapter 171.

Moreover, the Government's premise that any supposed "condition" on the waiver of sovereign immunity takes on jurisdictional force has no logical

stopping point. *See* Pet. Br. (Wong) at 3, 16, 42; Pet. Br. (June) at 6, 12, 27. Reformulating every element of the FTCA into a non-waivable and absolute jurisdictional requirement would impose a severe burden on the courts, which is impossible to attribute to Congress.

By the Government's lights, for example, every court hearing a case under the FTCA at the trial or appellate level would be obliged to raise sua sponte and fully evaluate every single one of the multiple exceptions to liability in 28 U.S.C. § 2680, whether or not the Government has raised that defense and even when the Government has explicitly abandoned it. Yet in prior cases, such as *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955), and *Block v. Neal*, 460 U.S. 289, 294 (1983), this Court observed that the government had conceded that the discretionary function exception was not implicated, a concession the Court did not question as it would have been obliged to do were it a jurisdictional element. Importantly, in the two decades since the Court clarified the jurisdictional reach of the FTCA in *Meyer*, no decision has ascribed jurisdictional significance to an exception.[2] *See generally* Sisk, *supra*, 50 Wm. & Mary L. Rev. at 559-60.

---

[2] This Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), is no exception to that post-*Meyer* avoidance of jurisdictional language in discussing FTCA exceptions. The Court said that foreign substantive law might apply in FTCA cases "if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign

(Continued on following page)

Indeed, in the more recent decision of *Dolan v. U.S. Postal Service*, 546 U.S. 481 (2006), this Court explained that it was inclined to construe these exceptions more narrowly, so as not to defeat the sweeping purpose of the FTCA in waiving sovereign immunity, an approach hard to reconcile with a stringent jurisdictional analysis.

In *Dolan*, the Court began by placing the pertinent FTCA provision in context within the act as a whole, separating the liability exception at issue from the core provisions that grant subject matter jurisdiction and accomplish the waiver of sovereign immunity. *See id.* at 483-85. The Court observed that the waiver of sovereign immunity for the FTCA comes in two sections of the code, the first of which "confers federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their employment," and the second of which directs that the United States is liable in the same manner as a private person under

---

harm" that had been planned or supervised inside the borders of the United States. *Id.* at 710. This potential invocation of foreign law was another reason to read the foreign country exception, 28 U.S.C. § 2680(k), as barring claims involving injury in another nation. *Sosa*, 542 U.S. at 710. In this part of the opinion, the Court was speaking of "jurisdiction" primarily in terms of the geographic location of the court, whether in one or another state or country, with choice of law consequences, rather than in terms of federal judicial authority to hear a particular class of claims. In any event, the Court did not suggest that the FTCA exception was a nonwaivable jurisdictional prerequisite. *See id.* at 710-12.

like circumstances but not for prejudgment interest or punitive damages. *Id.* at 484-85 (citing 28 U.S.C. §§ 1346(b)(1), 2674). By contrast, the "qualifi[cation of the FTCA] waiver of sovereign immunity for certain categories of claims" through thirteen exceptions is found in a separate and non-jurisdictional section. *See id.* at 485.

Moreover, the *Dolan* Court emphasized that the nature of the statutory provision at issue affects the manner in which it should be construed. Thus, the Court "noted that this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Id.* at 491 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The Court explained that "this principle is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 491-92 (citations omitted).

B. The FTCA Generally Places the United States on Equal Footing With Private Parties and Should be Interpreted Against the Backdrop of the Common Law of Torts

By so "waiv[ing] the Government's immunity from suit in sweeping language," *Dolan*, 546 U.S. at 492, the FTCA has been a leading example of "the

progressive relaxation by legislative enactments of the rigor of the immunity rule." *Dalehite v. United States*, 346 U.S. 15, 30 (1953). Congress enacted the FTCA in 1946 as both a matter of equity to citizens and to relieve itself of the burden of considering a multitude of private bills. *See* Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842; *see also* H.R. Rep. No. 79-1675, at 25 (1945) (stating that the FTCA should be applied "with justice and equity . . . to the claimants").

By the express language of the FTCA, the Federal Government "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. In other words, the United States is liable under the FTCA on the same basis and to the same extent as recovery would be allowed for a tort committed under like circumstances by a private person in that state. *Olson v. United States*, 546 U.S. 43, 44 (2006).

The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, Congress determined "to build upon the legal relationships formulated and characterized by the States" with respect to principles of tort law. *Richards v. United States*, 369 U.S. 1, 7 (1962); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 114 (2001) (stating that federal tort statutes should be interpreted "against the backdrop of common law rules of tort law").

Upholding the general purpose of the FTCA to place the United States on equal footing with private parties, this Court regularly has applied principles of federal tort liability that are consistent with expectations in private tort litigation:

In *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-83 (1949), this Court rejected the Government's plea for strict construction and held that the United States may be sued under the FTCA by a subrogee just as a private defendant.

In *United States v. Yellow Cab Co.*, 340 U.S. 543, 554-56 (1951), the Court again turned away a strict construction argument and held that the Federal Government may be impleaded as a third-party defendant under the FTCA by another tortfeasor seeking contribution. *See also Dalehite*, 346 U.S. at 31-32 & n.26 (saying that, "[w]here jurisdiction was clear" under the FTCA, the Court has "allowed recovery despite arguable procedural objections," such as by allowing the United States to be sued in tort for contribution and impleaded as a third party).

Perhaps most significantly for present purposes, in *United States v. Kubrick*, 444 U.S. 111, 113 (1979), this Court incorporated a "discovery rule" into the FTCA statute of limitations, holding that the time period does not begin to run until the injured person "knows both the existence and the cause of his injury." *See generally* Gregory C. Sisk, *Litigation With the Federal Government* § 3.03(b)(2), at 114-15 (ALI-ABA, 4th ed. 2006) (explaining that "there is a consensus

among the Courts of Appeals that a discovery rule applies generally for accrual of claims in all tort cases under the FTCA").

The availability of equitable tolling under the FTCA is "[b]olster[ed]" by the *Kubrick* Court's recognition of the discovery rule, which is part of the common law rather than the text of the FTCA and which as a practical matter "extends the statute of limitations by delaying the date on which it begins to run." *Arteaga v. United States*, 711 F.3d 828, 833 (7th Cir. 2013); *see also* Jacob Damrill, Note, *Waves of Change Towards a More Unified Approach: Equitable Tolling and the Federal Tort Claims Act*, 50 Tulsa L. Rev. 271, 297 (2015) ("The simple recognition [in *Kubrick*] that the statute of limitation does not begin to run until discovered – a common-law tort rule – supports the proposition that section 2401(b)'s limitations period is not absolute and is instead subject to equitable enlargement as is any normal tort claim."). Interestingly, before the Court of Appeals below, the Government acknowledged that this Court's construction of the FTCA statute of limitations in *Kubrick* was based on "equitable considerations" and effectively allowed for equitable tolling (while of course arguing that no further equitable accommodations should be made). Supplemental En Banc Opening Brief of the United States at 8, *Kwai Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (en banc) (No. 10-36136).

Accordingly, a statutory time limit in the FTCA, 28 U.S.C. § 2401(b), which is not included within the general section waiving sovereign immunity and

simultaneously conferring district court jurisdiction, should not be given a jurisdictional read or regarded as a nonwaivable constraint on judicial authority. Every Court of Appeals to address the question has recognized that the FTCA contains "a garden variety limitations provision," *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999), and has held or suggested that the FTCA provision is not jurisdictional and instead falls within the *Irwin* presumption that statutes of limitations in government cases are subject to equitable tolling. Given the equitable and remedial purposes of the FTCA, that conclusion is correct. *See Dalehite*, 346 U.S. at 24-25 (saying the FTCA was intended by Congress to "afford[] easy and simple access to the federal courts for torts within its scope").

CONCLUSION

In recent years, this Court has been steadily moving away from a parsimonious judicial attitude toward statutory waivers of sovereign immunity. The Government should not be granted two layers of presumptive protection, *both* on whether a waiver of sovereign immunity exists *and* on what terms, conditions, limitations, and procedures apply to that waiver. When there is a clear and unequivocal statutory waiver of sovereign immunity, the Government has shed the cloak of immunity and should generally be subject to the same limitation principles that apply to private civil litigants.

Respectfully submitted,

GREGORY C. SISK
Counsel of Record
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LaSalle Avenue
Minneapolis, Minnesota 55403
(651) 962-4923
gcsisk@stthomas.edu

Counsel for Amicus Curiae